87-1167

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

PRICE WATERHOUSE, PETITIONER

v.

ANN B. HOPKINS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PAUL M. BATOR
Counsel of Record
KATHRYN A. OBERLY
DOUGLAS A. POE
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

ELDON OLSON
General Counsel
ULRIC R. SULLIVAN
Assistant General Counsel
Price Waterhouse
1251 Avenue of the Americas
New York, New York 10020
(212) 489-8900

THEODORE B. OLSON
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

In this case petitioner Price Waterhouse was held to have violated Title VII of the Civil Rights Act of 1964 because of its failure to make respondent Hopkins a partner in the firm. Although Price Waterhouse was held to have established a legitimate, nondiscriminatory, nonpretextual reason for that decision, the court of appeals characterized the case as one involving "mixed motives" for the employment decision because the firm's decision-making process included some unconscious and unquantifiable measure of impermissible "sex stereotyping." The court of appeals held, 2-1, in conflict with the decisions of this Court and of other courts of appeals, that in a "mixed motive" case the plaintiff prevails unless the defendant shows—and shows by clear and convincing evidence—that impermissible bias was not a decisive cause of the employment decision.

The question presented is whether the court of appeals was in error in shifting the burden of persuasion on the issue of intentional discrimination to the defendant, and in defining that burden in accordance with the "clear and convincing" standard, even though the district court found that there existed a legitimate, nondiscriminatory, and nonpretextual reason for the employment decision, and even though there was no showing that discriminatory bias played any causal role in that decision.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

PRICE WATERHOUSE, PETITIONER

v.

ANN B. HOPKINS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Price Waterhouse respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-39a) is reported at 825 F.2d 458. The opinion of the district court (Gesell, D.J.) (App. B, *infra*, 40a-62a) is reported at 618 F. Supp. 1109.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 63a) was entered on August 4, 1987, and a petition for rehearing was denied on September 30, 1987 (App. D, *infra*, 65a). On December 11, 1987, Chief Justice Rehnquist extended the time for filing this petition to January 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. *Introduction.* The question presented by this petition involves the proper allocation of burdens of proof in Title VII cases, and is one on which the courts of appeals are in sharp conflict. Here a divided panel of the court of appeals (Edwards, J., and Joyce Hens Green, D.J., with Williams, J., dissenting) held that Price Waterhouse violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, when it declined to make respondent, Ann B. Hopkins, a partner in the firm. The court of appeals did not disturb the district court's factual finding that Price Waterhouse had established a legitimate, nondiscriminatory, and nonpretextual basis for its decision not to make Hopkins a partner, but it held that that showing was insufficient to negate liability under Title VII because the process by which Hopkins was considered for partnership may have included some unquantifiable measure of impermissible "sex stereotyping." Even though Hopkins presented no evidence of any illicit motivation on the part of any of the persons actually responsible for making the partnership decision at Price Waterhouse, the court of appeals characterized the case as one involving "mixed motives" on the basis of the testimony of an "expert * * * in the field of [sex] stereotyping" (App. 53a) who purported to see "sex stereotyping" in some of the casual language used about Hopkins by a few individuals (none of them final decisionmakers in her case, and all but one of them *supporters* of her partnership bid). It then held that in such "mixed motive" cases (a) the defendant employer bears the burden of proving that unlawful bias was not the determinative factor in the challenged employment decision; and (b) that burden must be carried by "clear and convincing" evidence.

The first question before this Court is whether—and in what circumstances—the plaintiff in a Title VII action may be relieved of the ultimate burden of proving that

intentional discrimination was a but-for cause of the adverse employment action. Second, even if such a dramatic departure from this Court's Title VII precedents and the conventional rules of the legal system is appropriate in limited circumstances, the further question is whether the employer in such a case must negative unlawful bias by the extraordinary standard of clear and convincing evidence. There is a direct and highly confusing series of conflicts among the courts of appeals on both of these questions.

In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, (1973), and *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), this Court allocated the burdens of proof and persuasion in Title VII disparate treatment cases. Emphasizing that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," the Court established a "division of intermediate evidentiary burdens" designed to resolve the "ultimate question" of intentional discrimination that a plaintiff must prove. *Burdine*, 450 U.S. at 253. First, the plaintiff must establish by a preponderance of the evidence a *prima facie* case of discrimination. The defendant is then permitted to meet that preliminary showing by " 'articulat[ing] some legitimate, nondiscriminatory reason for the employee's rejection.' " *Burdine*, 450 U.S. at 253 (quoting *McDonnell Douglas*, 411 U.S. at 802). If the defendant comes forward with such evidence, the plaintiff may attempt "to demonstrate that the proffered reason was not the true reason for the employment decision." *Burdine*, 450 U.S. at 256. A plaintiff who makes such a showing by a preponderance of the evidence will have successfully carried her burden of proving that she was "the victim of intentional discrimination." *Ibid.*

In *Burdine*, however, the Court specifically "discussed only the situation in which the issue is whether *either*

illegal *or* legal motives, *but not both*, were the 'true' motives behind the decision." *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 400 n.5 (1983) (emphasis added). Thus the Court has not yet expressly discussed the burdens of proof and persuasion in Title VII cases involving so-called "mixed-motive" situations—where, although there was a legitimate reason for the challenged employment action, it is alleged that there may also have existed an illegitimate motivation, and it is argued that Title VII was violated by the forbidden motive's presence.

In the absence of explicit guidance from this Court on that critical issue, the courts of appeals have adopted widely divergent analyses, allocating the burdens and setting the standards of proof in so-called "mixed-motive" Title VII cases in no fewer than five different ways. Some circuits require the plaintiff to prove by a preponderance of the evidence that the decisive "but-for" reason for the adverse employment decision was intentional discrimination. Other circuits require the same "but-for" showing, but they require it to be made by the defendant rather than the plaintiff. The court of appeals in this case aligned itself with the courts that put the burden on the defendant, but created yet another category by holding that that burden could be satisfied only by the extraordinary standard of clear and convincing evidence, rather than a preponderance of the evidence. Finally, some circuits draw a distinction between the liability and remedy phases of a case, holding that Title VII liability will be found whenever an impermissible motive was present to any extent, but permitting the defendant to avoid the imposition of affirmative relief (such as reinstatement or promotion) by showing that unlawful bias was not a but-for cause of the challenged decision. Here again, there is a split within the circuits on whether a defendant's burden of proof on the question of remedy must be carried by clear and convincing evi-

dence or may be satisfied by a preponderance of the evidence instead.

We discuss below the conflict among the circuits and the need for a definitive resolution by this Court (see pages 13-17, *infra*). First, however, we briefly describe the findings and conclusions of the courts below.

2. *The District Court's Findings.* Hopkins initiated this action in the United States District Court for the District of Columbia, claiming that unlawful sex discrimination was the cause of Price Waterhouse's decision not to advance her to partnership in 1982.[1] In response, Price Waterhouse showed that during her five-year period of employment with the firm her abrasive personality and deficient interpersonal skills created grave problems, making it particularly difficult for employees subject to her supervision to work harmoniously with her. One staff member (who testified *on Hopkins' behalf*) indicated that "it required 'diplomacy, patience and guts' to work with her." App. 46a (quoting 3/27/85 Tr. 434). The district court accepted this showing, agreeing with Price Waterhouse that Hopkins "had considerable problems dealing with staff and peers." App. 59a. Indeed, after carefully examining Hopkins' employment history at Price Waterhouse, the district court found that both "[s]upporters and opponents of her candidacy indicated that [Hopkins] was sometimes overly aggressive, unduly harsh, difficult

---

[1] Initially, Price Waterhouse decided only to place Hopkins' partnership candidacy on "hold" for at least a year, " 'to afford [Hopkins] time to demonstrate that she has the personal and leadership qualities required of a partner.' " App. 44a (citation omitted). Several months after that decision, however, two Price Waterhouse partners who had been key advocates of Hopkins' partnership bid decided instead to oppose it, and Hopkins' advocates concluded that reconsideration in the next year's partnership selection cycle would therefore be in vain. *The district court found that the decision not to reconsider was not discriminatory* (*id.* at 48a), *and Hopkins did not appeal that determination.*

to work with and impatient with staff." *Id.* at 43a-44a. The district court concluded that the complaints about Hopkins' "interpersonal skills were not fabricated as a pretext for discrimination" and that Hopkins' "conduct provided ample justification for the complaints that formed the basis of the [firm's] decision" that her partnership candidacy should be postponed for at least one year. *Id.* at 46a-47a.

The district court also rejected Hopkins' attempt, based on a comparison of her file with those of similarly situated men, to show that Price Waterhouse treated her differently from male candidates with abrasive or aggressive personalities. At the same time, however, the district court believed that some of the negative characterizations about Hopkins' foul language, arrogance, and impatience—*e.g.*, that she needed to take a "course in charm school"—reflected "unconscious" (App. 54a) but "discriminatory [sex] stereotyp[ing]." *Id.* at 57a. Still, the district court balanced this evidence against the record of acknowledged "deficiencies" in Hopkins' performance (*id.* at 46a)—deficiencies acknowledged not only by the district court but, at least in some cases, by Hopkins herself. *Ibid.* At the end of the day, the district court found, Hopkins had proved only that sex stereotyping "played an *undefined* role in blocking [her] admission to the partnership." *Id.* at 54a (emphasis added). Because of this weak showing, the district court found,

> the Court cannot say that [Hopkins] would have been elected to partnership if the Policy Board's decision had not been tainted by sexually biased evaluations.

Id. at 59a.

The district court thus found that Hopkins had not shown that discrimination by Price Waterhouse *caused* the harm she was suing to redress: the evidence did not establish that she would have made partner even in the

absence of any sexual stereotyping or that such conduct was actually a motivating factor in Price Waterhouse's decision. (Indeed, the district court did not find even "unconscious" stereotyping on the part of any person at Price Waterhouse responsible for actually making the relevant decision about Hopkins.) Nevertheless, the district court found that Title VII was violated. The violation was deemed to arise from the confluence of three factors, none of which the court thought was discriminatory standing alone. First, "[c]omments influenced"—albeit "unconsciously"—"by sex stereotypes were made by partners." Second,

> the firm's evaluation process gave substantial weight to these comments; and [third], the partnership failed to address the conspicuous problem of stereotyping in partnership evaluations. While these three factors might have been innocent alone, they combined to produce discrimination in the case of this plaintiff.

App. 58a. Price Waterhouse was found liable because, "[d]espite the fact that the comments on women candidates often suggested that the male evaluators may have been influenced by sex bias, the Policy Board never addressed the problem." *Id.* at 55a.

The defendant's liability was thus *not* predicated upon an employment decision shown to have been made on the basis of gender; the district court did not find that discrimination caused Hopkins' rejection. Price Waterhouse was found to have committed an intentional violation of Title VII solely by failing to counteract the unconscious sexism that the court read into the colloquialisms of some of her colleagues—none of them the ultimate decisionmakers—commenting on her performance in the course of the evaluation process.

The district court's imposition of liability notwithstanding its failure to find that Hopkins' rejection was caused by discrimination is particularly troubling because of the way in which the existence of even "unconscious" sex

steretoyping was divined. The district court's insight into these unconscious elements of Price Waterhouse's partnership decisionmaking process came primarily from the testimony of Dr. Susan Fiske, "a well qualified expert" in the "field of stereotyping." App. 53a. Although Dr. Fiske had never met Hopkins, and made no inquiry whatever into the facts of Hopkins' actual performance at Price Waterhouse, her review of the written comments made by Price Waterhouse partners about Hopkins' performance enabled her to opine that the partners' negative statements about Hopkins' rudeness, arrogance, and abrasiveness were caused by sexual stereotypes rather than the reality that they accurately described. Dr. Fiske reached this conclusion by simply *excluding* from her consideration the actual evidence of Hopkins' behavior, evidence that persuaded even the district court that Hopkins' "conduct provided ample justification for the complaints" about her. *Id.* at 46a-47a. Here is a typical exchange:

> Q. * * * Some of these folks describe Miss Hopkins, as you have read back to me, as overbearing, arrogant, self-centered, abrasive, thinks she knows more than anyone in the universe, and potentially dangerous. Would you think it would be somehow a stereotypical decision to exclude such a person from the partnership if that was in fact true?
>
> A. I am not qualified to say whether or not it is true * * * [b]ecause I didn't observe her behavior.

3/28/85 Tr. 596-597.

As Judge Williams, dissenting below, observed, this means that "if an observer characterized someone as 'overbearing and arrogant and abrasive and running over people,' an expert such as Dr. Fiske could discern * * * that [those comments] stemmed from unconscious stereotypes * * * without meeting the subject of the comment or making any inquiry into a possible factual basis." App. 36a. Further, Dr. Fiske found forbidden motives even in the comments of partners who *supported* Hopkins' partnership bid because their favorable comments were efforts "to overcome their stereotypical attitudes." *Id.* at 13a n.3 (citing 3/28/85 Tr. 565). It seems clear, therefore, that on this approach "no woman could *be* overbearing, arrogant or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to a woman on such attributes." App. 36a (Williams, J., dissenting).[2]

3. *The Court Of Appeals' Decision.* A divided panel of the court of appeals affirmed the district court's finding of liability as well as the theory upon which it was based. Most important for present purposes, the court expressly recognized that the causation issue was at the center of the case. Noting the split among the circuits as to where the burden of proof should be placed (App. 21a n.8), the court of appeals rejected Price Waterhouse's appeal only "[b]ecause Price Waterhouse could not demonstrate by clear and convincing evidence that impermissible bias was not the determinative factor" (*id.* at 25a). Price Waterhouse was held to have violated Title VII solely on the basis of the amorphous proposition that "stereotypical attitudes towards women had manifested themselves in connection with the partnership bids of other women and * * * that these stereotypes had been brought to bear on

---

[2] Dr. Fiske's testimony was disturbing in yet another respect. Over Price Waterhouse's objection (3/28/85 Tr. 539), Hopkins was permitted to use Dr. Fiske as a "rebuttal" witness in a supposed effort to negate Price Waterhouse's showing that it had a legitimate, nondiscriminatory reason for its decision not to make Hopkins a partner. At this stage of the case, however, Hopkins should have been permitted only to attempt to prove that the reason articulated by Price Waterhouse was a pretext for discrimination. See *Burdine*, 450 U.S. at 256. In fact, Hopkins never attempted to prove pretext, and, as previously noted, the district court expressly found that the complaints about Hopkins' "interpersonal skills were *not* fabricated as a pretext for discrimination" (App. 46a) (emphasis added).

[Hopkins'] candidacy" (*id.* at 20a)—even though Hopkins had not proved that she would have been made a partner in the absence of stereotyping. Indeed, the court of appeals expressly refused to require Hopkins to make any such showing. Assigning to Title VII plaintiffs the burden of proof on every aspect of their cases, including causation, the court held, would "place an enormous, perhaps insurmountable, burden on Title VII litigants" (*ibid.*). Instead, the court of appeals shifted the burden to Price Waterhouse to negate by clear and convincing evidence a fact that the court acknowledged was "impossible to measure." App. 9a.[3]

In dissent, Judge Williams agreed that the central issue on appeal was causation, but observed that "the record here provided no causal connection between Hopkins' fate and such stereotyping as went on among Price Waterhouse's 662 partners." App. 29a.[4] Judge Williams also

---

[3] After being informed that she would not be reproposed for partnership (see note 1, *supra*), Hopkins resigned from the firm. The district court held that Hopkins failed to prove that the decision not to repropose was a "constructive discharge," and it therefore ruled that Hopkins was not entitled to an order directing Price Waterhouse to make her a partner. App. 60a-61a. The court of appeals reversed this aspect of the district court's decision and remanded the case for further proceedings on the remedial phase of the case. *Id.* at 27a-28a.

[4] As Judge Williams noted, "[t]he only remark by a Hopkins *opponent* that can be characterized as manifesting sexual stereotyping is the facetious suggestion that she should take a 'course at charm school.' The smoke from this gun seems to me rather wispy. It was embedded in the following comment:

> Contacts with Ann are only casual—several mtgs at OGS and MMGS sessions. However, she is consistently annoying and irritating—believes she knows more than anyone about anything, is not afraid to let the world know it. Suggest a course at charm school before she is considered for admission. I would be embarrassed to introduce her as a ptnr."

App. 33a (emphasis added). The majority was able to find evidence of sex stereotyping in the "charm school" remark only by resorting

was troubled by Dr. Fiske's impressive claim that she was "able to find forbidden stereotyping simply by reading partners' comments—without information about the truth of the matters commented upon." *Id* at 36a. Finally, Judge Williams objected to the majority's willingness to find that the mere presence of stereotypes would result in Title VII liability unless the employer undertook "to institute special programs for sensitizing partners to sex stereotyping or otherwise to stamp it out of the evaluation process." *Id.* at 37a. Judge Williams suggested that,

> [i]f such an omission is to ground liability, perhaps the plaintiff should bear an initial burden of demonstrating that gender stereotyping was more probably than not the cause of the adverse employment decision. * * *
>
> From the facts here, it looks as though the duty to sensitize has a hair trigger. The implications are serious. The more delicate the trigger, the more completely this court has dropped the requirement of intentional discrimination out of the law. * * * The rule turns Title VII from a prohibition of discriminatory conduct into an engine for rooting out sexist thoughts.

Ibid.

REASONS FOR GRANTING THE PETITION

In conflict with decisions of this Court and of other courts of appeals, the court of appeals in this case incorrectly decided questions of great importance to the administration of the civil rights laws. This Court has held

---

to Webster's definition, not of that term, but of the term "finishing school." See App. 13a n.4. But Webster's defines "charm school" in sex-neutral terms, stating simply that it is "a school in which social graces are taught." Webster's Third New International Dictionary 378 (1986). The majority did not explain why it would be discriminatory for Price Waterhouse to insist that all of its partners, male and female, be schooled in the social graces.

that the burden of persuasion in Title VII cases remains at all times with the plaintiff. *Burdine*, 450 U.S. at 256. The court of appeals' decision contravenes that principle in at least three ways. First, the court's decision requires the *defendant* to prove that discrimination did *not* cause the adverse employment decision, rather than requiring the plaintiff to prove that it did. Second, even if it were appropriate to relieve the plaintiff of the ultimate burden of persuasion on the question of causation in specific, narrow circumstances, the court of appeals erred gravely by requiring the defendant to make its showing by clear and convincing evidence. Third, the court of appeals improperly evaded the holding of *Burdine* by characterizing this case as one of "mixed motives" on the basis of impalpable evidence of supposed sexism—discernible only through an "expert" judgment that in fact ignored most of the *actual* evidence in the case—that was not shown to have had a causal impact on the disputed employment decision. The net effect of the court of appeals' decision is to place a virtually insurmountable burden on an employer, even where there exists overwhelming evidence of a legitimate, nondiscriminatory, and nonpretextual basis for its refusal to promote a Title VII plaintiff.

The circuits are in total disarray on the appropriate allocation of the burdens and standards of proof in so-called "mixed-motive" cases, adopting no fewer than five different approaches to this issue. Review by this Court is needed to abate this confusion. And review is particularly appropriate in this case because, among the possible approaches to this problem, the court below chose one that clearly violates this Court's precedents and cannot be squared with the policies of Title VII. Accordingly, review by this Court is warranted.

A. The Conflict Among The Circuits Requires Resolution By This Court.

As the court of appeals recognized (App. 20a-21a & n.8), the circuits are in conflict on the question whether a Title VII plaintiff must prove that impermissible discrimination was a "but-for" cause of a challenged employment decision.[5] Lacking a uniform rule, the courts of appeals have devised no fewer than five inconsistent ways to resolve cases in which it is argued that the defendant acted on the basis of both a lawful and an unlawful motive.

The first approach is based on this Court's statement in *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976), that, for a Title VII plaintiff to prevail, "no more is required to be shown than that race was a 'but for' cause" of the challenged employment decision. The Third, Fourth, Fifth and Seventh Circuits draw their rule in mixed-motive cases from this observation, holding that "a [Title VII] *plaintiff* must show that his status as a minority class was the but for reason for the treatment accorded." *Bellissimo* v. *Westinghouse Elec. Corp.*, 764 F.2d 175, 179 (3d Cir. 1985), cert. denied, 475 U.S. 1035 (1986) (emphasis added) (citing *Lewis* v. *University of Pittsburgh*, 725 F.2d 910, 916 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984), and noting the "considerable confusion" regarding the proper standard of proof in Title VII cases). Accord *Ross* v. *Communications Satellite Corp.*, 759 F.2d 355, 365-366 (4th Cir. 1985) ("[f]or the employee to disprove a legitimate

---

[5] Although the court of appeals recognized the existence of a conflict, it did not fully describe the extent of that conflict, nor did it evidence any awareness that the conflict embraces two separate questions: first, whether the plaintiff or the defendant bears the burden of proving causation in a "mixed-motive" case and, second, whether the standard of proof by which that burden must be met is a preponderance of the evidence or clear and convincing evidence. Compare pages 13-16, *infra*, with App. 21a n.8.

nondiscriminatory explanation for adverse action, the third stage of the *Burdine* analysis, we determine that he must show that the adverse action would not have occurred 'but for' the protected conduct");[6] *Jack* v. *Texaco Research Center*, 743 F.2d 1129, 1131 (5th Cir. 1984) ("the employee will prevail only by proving that 'but for' the protected activity she would not have been subjected to the action of which she claims"); *McQuillen* v. *Wisconsin Education Ass'n Council*, 830 F.2d 659, 664 (7th Cir. 1987) ("the employee must establish that the discriminatory motivation was a determining factor in the challenged employment decision in that the employee would have received the job absent the discriminatory motivation").

The second approach, adopted by the First, Sixth and Eleventh Circuits, turns on the same "but-for" inquiry but reverses the burden of proof. These courts require the *defendant* to show *by a preponderance of the evidence* that, even without the forbidden motive, it would have made the same employment decision. *Fields* v. *Clark University*, 817 F.2d 931, 936 (1st Cir. 1987) (once plaintiff proves "that unlawful discrimination was a motivating factor in the employment decision * * * the defendant must prove that the same decision would have

[6] In an earlier case, the Fourth Circuit appeared to adopt the rule followed in the Ninth Circuit (see page 16, *infra*), holding that, "[o]nce a plaintiff establishes that she was discriminated against, the defendant bears the burden of showing [by clear and convincing evidence] that the plaintiff would not have been promoted even in the absence of discrimination." *Patterson* v. *Greenwood School Dist. 50*, 696 F.2d 293, 295 (4th Cir. 1982). Although the Fourth Circuit has never overruled *Patterson*, it has cited that decision only twice since it decided *Ross*—once in a dissenting opinion and once in dictum. See *Davis* v. *Richmond, Fredericksburg & Potomac R.R.*, 803 F.2d 1322, 1332 (1986) (Haynsworth, J., disrenting); *Soble* v. *University of Maryland*, 778 F.2d 164, 166 n.4 (1985) (dictum). *Ross*, therefore, apparently represents prevailing Fourth Circuit law. The situation in the Fourth Circuit confirms the extent of confusion and disarray among the courts of appeals.

been made absent the discrimination"); *Terbovitz* v. *Fiscal Court of Adair County*, 825 F.2d 111, 115 (6th Cir. 1987) (quoting *Blalock* v. *Metal Trades, Inc.*, 775 F.2d 703, 712 (6th Cir. 1985)) (if plaintiff shows the presence of an illegal motive, "the burden shifts to the employer to prove by a preponderance of the evidence 'that the adverse employment action would have been taken even in the absence of the impermissible motivation'"); *Bell* v. *Birmingham Linen Service*, 715 F.2d 1552, 1557 (11th Cir. 1983), cert. denied, 467 U.S. 1284 (1984) (quoting *Lee* v. *Russell County Bd. of Educ.*, 684 F.2d 769, 774 (11th Cir. 1982), for the proposition that "[o]nce an [illegal] motive is proved to have been a significant or substantial factor in an employment decision, defendant can rebut only by *proving* by a preponderance of the evidence that the same decision would have been reached even absent the presence of that factor" (emphasis added by the *Birmingham Linen* court)).

The District of Columbia Circuit likewise requires the defendant in a mixed-motive case to prove that it would have made the same employment decision even absent the proscribed motivation. App. 23a-25a. But that court goes further, requiring that the showing be made not by a preponderance of the evidence but by clear and convincing evidence. *Id.* at 25a.

Finally, the Eighth and Ninth Circuits draw a distinction between the liability and remedy phases of a Title VII case. The Eighth Circuit holds that Title VII liability is established whenever an illegal motive is present in an adverse employment decision, even if the same decision would have been made in the absence of the forbidden motive. *Bibbs* v. *Block*, 778 F.2d 1318 (8th Cir. 1985) (en banc). The finding of liability will entitle the plaintiff to at least some relief, such as "a declaratory judgment, partial attorney's fees, and injunctive relief" (*id.* at 1324). But a defendant in the Eighth Circuit can avoid the award of retroactive promotion or reinstatement

and back pay by showing by a preponderance of the evidence that it would have taken the same employment action in any event. *Id.* at 1324 & n.5.

The Ninth Circuit employs an essentially similar analysis, but it permits the defendant to avoid the imposition of affirmative relief only if it can prove by clear and convincing evidence, rather than by a preponderance of the evidence, that it would have made the same decision even in the absence of the prohibited motivation. *Fadhl* v. *City & County of San Francisco*, 741 F.2d 1163, 1165-1166 (9th Cir. 1984); *Muntin* v. *California Parks & Recreation Dep't*, 738 F.2d 1054, 1055-1056 (9th Cir. 1984); see also *Ruggles* v. *California Polytechnic State Univ.*, 797 F.2d 782, 787 n.1 (9th Cir. 1986).

As the foregoing summary demonstrates, the lower courts are in need of guidance on the proper standards and allocation of burdens of proof for mixed-motive Title VII claims, being divided in several different ways. Some assign the but-for burden to the plaintiff; some to the defendant. Some hold that the but-for inquiry is irrelevant in the liability context, but dispositive at the remedy stage. Finally, even those circuits that agree that the defendant must make the but-for showing at some phase of the litigation cannot agree on the standard of proof: some hold that the defendant must make its showing by clear and convincing evidence, while others require only a preponderance.[7]

The district court's factual findings in this case—that atmospheric sexism could be detected in some of the written evaluations of Hopkins' performance, but that Hopkins did not show that she would have been asked to be a partner even absent that factor—clearly present the issues that must be resolved. The instant case is therefore well suited to enable this Court to provide the necessary guidance.[8]

[7] The Solicitor General recently noted the existence of this latter conflict in his Brief in Opposition (at 8 n.4) in *Haskins* v. *United States Dep't of the Army*, cert. denied, No. 86-1626 (Oct. 5, 1987). As the government there explained, *Haskins* was an inappropriate case in which to resolve the conflict because the plaintiff in that case received the benefit of the clear and convincing standard and yet still failed to win her case.

B. This Court's Precedents Dictate That A Title VII Plaintiff May Prevail Only By Showing That Discrimination Was A But-For Cause Of The Challenged Employment Decision.

Burdine's statement that the plaintiff retains the "ultimate burden of persuading the court that she has been the victim of intentional discrimination," 450 U.S. at 256, precludes a Title VII defendant from being saddled with the burden of persuasion on the question of causation. As *Burdine* itself explained, the intermediate burden placed on a defendant is merely one of production: the defendant must come forward with *evidence* that it had a legitimate reason for the challenged employment decision, but the defendant need not *prove* anything. Thus, the Court stated,

> [t]he defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. * * * If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted * * *.

Id. at 254-255 (citation and footnotes omitted).

The ultimate issue in a case like this one is the same as the ultimate issue in a case like *Burdine*: did discrimination cause the plaintiff's injury? *Burdine* teaches

[8] A ruling in this case from this Court would be important not only for private employers, but also for the federal government, in light of the large number of Title VII cases brought in the District of Columbia against the federal government in its capacity as the nation's largest employer.

that the plaintiff bears the burden of proving an affirmative answer to that question. Of course, a forbidden motive cannot have caused an injury if the employment decision would have been the same in any event. If the law requires a plaintiff to prove that discrimination caused her injury, the same law must necessarily require the plaintiff to show that without discrimination the injury would not have occurred.

This rule—that the party with the burden of persuasion must at a minimum show but-for causation—is the conventional tort rule. Indeed,

> the "but-for" or "sine qua non" rule * * * [is] [a]t most * * * a rule of exclusion: if the event would not have occurred "but for" the defendant's negligence, it still does not follow that there is liability.

W. Prosser, *The Law of Torts* 238-239 (4th ed. 1971).[9] The same rule should be applied here.

Burdine instructs that the burden of proof is allocated in discrimination cases in the same way it is allocated in other kinds of civil litigation. This Court has on other occasions relied on analogies to tort or other civil law in deducing the rules to govern cases brought under Title VII. See, *e.g.*, *United States Postal Service* v. *Aikens*, 460 U.S. 711, 716 (1983) (cautioning that the differences between Title VII litigation and other cases does not mean "that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact"); see also *Anderson* v. *City of Bessemer*, 470 U.S. 564 (1985) (clearing erroneous standard of review applies with the same force in Title VII litigation as in other civil cases).

---

[9] An exception is the case in which either of two actions is independently sufficient to cause an injury. See Prosser, *supra*, at 240; H.L.A. Hart & A. Honore, *Causation in the Law* 107 (1973). That exception is irrelevant here.

Removing the causation burden from the plaintiff has highly undesirable consequences. The antidiscrimination laws address intentions as well as conduct, and some efforts will therefore be necessary under any rule to ascertain the defendant's motivation. But an affirmative finding that the defendant violated the law (and should therefore be subject to governmentally imposed sanctions) by discriminating in an employment decision, even where there existed a wholly legitimate and nonpretextual basis for that decision, should be based on fair and substantial evidence that intentional discrimination played a decisive role; it should not be based on fragmentary evidence of possible sexist factors that are artificially leveraged into a finding of "intention discrimination" by a shift in the burden of persuasion. Title VII was not designed to prevent employers from basing employment decisions on legitimate, job-related, nondiscriminatory factors; if one of these exists and is shown to be nonpretextual, the employment decision should not be overturned without a fair affirmative basis for believing that that decision would not have been made without the presence of a prohibited motive.

Further, without a fair affirmative showing of causation, liability will have been imposed solely because of perceived "discrimination in the air"—because of vague notions of "societal discrimination" that have not been shown to have harmed the plaintiff directly. This Court has repeatedly refused to adopt such a standard. *Wygant* v. *Jackson Bd. of Educ.*, 106 S. Ct. 1842, 1848 (1986) (opinion of Powell, J.); *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 307-308 (1978) (opinion of Powell, J.). See also *Fields* v. *Clark University*, 817 F.2d 931, 935 (1st Cir. 1987) (proof that "the [challenged] decision was infected with discrimination" does not necessarily entitle plaintiff to relief). Indeed, the express language of Title VII itself precludes a finding of liability in the absence of proof of causation. The statute

provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's * * * sex" (42 U.S.C. § 2000e-2(a)(1) (emphasis added)). Further, Title VII expressly prohibits courts from requiring "the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, *if such individual was refused * * * employment or advancement * * * for any reason other than discrimination on account of * * * sex*" (42 U.S.C. § 2000e-5(g) (emphasis added)). As the Seventh Circuit recognized, the language of "Title VII contains a clear causal requirement between discriminatory motivation and the challenged employment decision." *McQuillen*, 830 F.2d at 664. The court of appeals' decision in this case, relieving plaintiff of the burden of proving causation, cannot be reconciled with these express statutory limitations on the reach of Title VII.[10]

---

[10] We recognize that in *Mt. Healthy City School Dist.* v. *Doyle*, 429 U.S. 274, 287 (1977), the Court held that once a plaintiff has shown that constitutionally protected conduct was a "substantial" or "motivating" factor in an adverse employment decision, the burden shifts to the defendant to prove, by a preponderance of the evidence, that it would have made the same employment decision even in the absence of the protected conduct. Similarly, in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), the Court accepted the NLRB's position that once the General Counsel of the Board has proved that conduct protected by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, was a "substantial" or "motivating" factor in the discharge of an employee, the burden shifts to the employer to prove, by a preponderance of the evidence, "that the discharge would have occurred in any event and for valid reasons" (462 U.S. at 400). These cases, however, did not address the specific language of Title VII, and thus they do not govern the question presented here. And even if *Mt. Healthy* and *Transportation Management* were thought to support shifting the burden of proof to the defendant in a Title VII case, the most that could be required of the employer under those cases is proof *by a preponderance of the evidence* that the employment decision would have been the same; the court of appeals' imposition of the *clear and convincing* standard finds no support whatever in this Court's precedents.

C. Even If A Defendant Must Show That The Same Decision Would Have Been Made Without The Forbidden Motive, The Court Of Appeals Erred By Requiring That That Showing Be Made By Clear And Convincing Evidence.

The Court has made it clear that the interests at issue in a Title VII case, while important, do not justify departure from the settled rules governing " 'the basic allocation of burdens and order of presentation of proof.' " *Aikens*, 460 U.S. at 716 (quoting *Burdine*, 450 U.S. at 252). The *Aikens* Court stated:

> All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes. *But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.*

460 U.S. at 716 (emphasis added). See also *id.* at 718 (Blackmun, J., concurring) ("the ultimate determination of factual liability in discrimination cases should be no different from that in other types of civil suits").

This Court has consistently affirmed that the preponderance of the evidence standard is the burden generally imposed in civil litigation. See *Rivera* v. *Minnich*, 107 S.Ct. 3001, 3003 (1987) (footnote omitted) ("[t]he preponderance of the evidence standard * * * is the standard that is applied most frequently in litigation between private parties in every state"); *id.* at 3003 n.5 (citing E. Cleary, *McCormick on Evidence* 956 (3d ed. 1984), for the proposition that the preponderance standard applies "to 'the general run of issues in civil cases' "); *Her-*

man & MacLean v. *Huddleston*, 459 U.S. 375, 387 (1983). The preponderance standard is typically applied even when the defendant can lose his livelihood if the decision goes against him, so long as the proceeding is civil rather than criminal. *Steadman* v. *SEC*, 450 U.S. 91 (1981). The court of appeals' decision in this case to hold Price Waterhouse to the clear and convincing standard cannot be reconciled with this rule. The fact that the standard was imposed upon the defendant, rather than the plaintiff, makes the error all the more egregious.[11]

In certain limited and unusual circumstances, the Court has required the *plaintiff* in a civil proceeding to prove his case by clear and convincing evidence. See *Santosky* v. *Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Addington* v. *Texas*, 441 U.S. 418 (1979) (civil commitment); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 52 (1971) (defamation); *Woodby* v. *INS*, 385 U.S. 276, 285 (1966) (deportation; *Chaunt* v. *United States*, 364 U.S. 350, 353 (1960) (denaturalization).[12] In these cases this Court recognized that where

[11] Because the ultimate issue in discrimination cases will often turn on the defendant's state of mind, the Court in *Aikens* analogized the factual questions at issue in such cases to those presented in cases of misrepresentation. 460 U.S. at 716. The law of fraud, of course, has departed from the preponderance standard; but it did so by requiring the *plaintiff* to prove his case by clear and convincing evidence. See *Herman & MacLean* v. *Huddleston*, 459 U.S. at 388 n.27.

[12] When a public body charged with violating Title VII has a history of de jure segregation, it has been held appropriate to require the defendant to prove by clear and convincing evidence that the challenged employment decision was made on the basis of race-neutral criteria. See *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 209 (1973) (citing *Chambers* v. *Hendersonville City Bd. of Educ.*, 364 F.2d 189, 192 (4th Cir. 1966) (en banc)). This rule, of course, is entirely irrelevant in this case, because the district court did not purport to find a past history of discrimination at Price Waterhouse. See *Lujan* v. *Franklin County Bd. of Educ.*, 766 F.2d 917, 925-929 (6th Cir. 1985) (explaining that, after *Burdine*, the *Chambers* doctrine is applicable only in pattern or practice and disparate impact cases). See also *Love* v. *Alamance County Bd. of Educ.*, 757 F.2d 1504, 1508-1510 (4th Cir. 1985) (explaining the kind of de jure segregation a public body must have imposed before the *Chambers* doctrine becomes relevant). Given the district court's rejection in this case of all of Hopkins' comparative evidence, the discussion in *Alamanace County* makes clear that Hopkins could not have satisfied the requirements it imposes even if she had sought to apply the doctrine here.

a plaintiff seeks certain affirmative, coercive, interventions, the courts may deny their aid unless the intervention is shown to be warranted under a rigorous evidentiary standard. But in this case such an evidentiary standard was imposed on a *defendant* who is *resisting* the imposition of coercive governmental sanctions. Given the Court's insistence that Title VII cases are not different from other private rights of action, it is a startling step in the *wrong* direction to say to a Title VII defendant that it will be deemed to have violated the law, and will thus be subject to sanctions, unless it can show by clear and convincing evidence that it was not guilty of intentional discrimination.

D. The Court Of Appeals Evaded This Court's Decision In *Burdine* By Improperly Characterizing This Case As One Involving "Mixed Motives."

With virtually no supporting precedent, the court of appeals in this case adopted an approach to the burden of proof issue that makes it essentially impossible for an employer to win a Title VII case of this type. Not only did the court place the burden on the defendant employer to prove a negative—that an improper motive was *not* the determinative factor in the adverse employment action—but it also required this showing to be accomplished by the extraordinary standard of clear and convincing evidence. More startling still, these Draconian rules were applied in a context where the evidentiary record failed wholly to provide a fair and plausible basis

for the conclusion that impermissible motives in fact played a significant causal role at all in the employment decision.

In this case the court of appeals did not disturb the district court's findings that, *first*, Price Waterhouse had established a legitimate, nondiscriminatory, and nonpretextual basis for its decision not to make Hopkins a partner; *second*, Hopkins had not proved that she would have been made a partner in the absence of sex "stereotyping"; and *third*, a Title VII violation had occurred solely because some participants in the evaluation process (but not the actual decisionmakers themselves) had engaged in unconscious and unquantifiable sex "stereotyping" and because the firm had not taken steps to eliminate this improper element from the environment.

The court of appeals then evaded *Burdine* by proceeding on this impalpable basis to characterize the case as one where "mixed motives" were present and a shift in the burden of proof therefore warranted. The difficulty is that virtually any case can be transformed into one of "mixed motives" on the showing made here.[13] The *Burdine* rule, which unequivocally places the ultimate burden

---

[13] As discussed above (pages 7-9, *supra*), Hopkins' expert witness reached her conclusion that various partners' statements were reflections of sex "stereotyping," rather than accurate observations drawn from direct contact with Hopkins, even though the witness herself had never met Hopkins and had no knowledge whatever of Hopkins' bevarior at Price Waterhouse. Moreover, as Judge Williams demonstrated in his dissent (App. 31a-36a), the handful of statements upon which the expert relied for her "stereotyping" conclusion were, virtually without exception, either (1) made by Hopkins' *supporters* and therefore were unlikely to have adversely affected her partnership candidacy, or (2) made at a remote time and about other women who *did* become partners, or (3) made by persons outside the decisionmaking chain, so that no adverse effect on Hopkins could have occurred, and/or (4) made in a fashion so that the implications of the statements were either utterly benign or, at worst, ambiguous, requiring a healthy imagination to assign illicit motivation to them. For example, the only supposedly stereotypic remark made by a partner who actually opposed Hopkins' partnership candidacy consisted of a suggestion that she should take a "course at charm school." *Id.* at 6a, 33a. As Judge Williams observed, this remark was simply a "silly phrase" inserted in a much lengthier substantive comment that described Hopkins' difficult personality in terms that had "nothing to do with sex stereotypes." *Id.* at 33a. See also note 4, *supra*.

of persuasion in discrimination cases upon the plaintiff, will be effectively swallowed up by the "mixed-motive" exception; and the rule's evisceration is completed by the imposition upon the employer of the clear and convincing evidentiary standard.

Even if, in limited circumstances, a soundly based "mixed-motive" analysis is appropriate and consistent with *Burdine*, guidance from this Court is urgently needed concerning its proper scope. In the absence of such guidance, *Burdine* will simply disappear in a sea of "findings" of mixed motives. Particularly where, as here, the clear and convincing burden is placed upon the employer, the employer will have no opportunity fairly to contest Title VII cases based on the rules adopted by Congress as interpreted by this Court.

This Court has, in other contexts, had to deal with the problem of erosion in the general requirement of the legal system that findings may not be validated on the basis of "expert" intuitions in the absence of fair and substantial support in the record as a whole. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); and see Jaffe, *Judicial Review: Questions of Fact*, 69 Harv. L. Rev. 1020 (1956). Such erosion will certainly take place here in the absence of firm insistence by this Court that a finding of a Title VII violation must be based, at a minimum, on a fair and substantial showing in the record as a whole that the disputed employment decision was in fact caused by illegal discrimination, and that radical

shifts in the placement and content of the burden of proof, themselves triggered almost entirely on the basis of intuitive speculations rather than on findings as to the employer's *actual* motives, cannot substitute for such a showing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL M. BATOR
Counsel of Record
KATHRYN A. OBERLY
DOUGLAS A. POE
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

ELDON OLSON
General Counsel
ULRIC R. SULLIVAN
Assistant General Counsel
Price Waterhouse
1251 Avenue of the Americas
New York, New York 10020
(212) 489-8900

THEODORE B. OLSON
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

JANUARY 1988

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 85-6052, 85-6097

ANN B. HOPKINS,

Appellant,

v.

PRICE WATERHOUSE

ANN B. HOPKINS

v.

PRICE WATERHOUSE,

Appellant.

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 84-3040)

Argued Oct. 23, 1986

Decided Aug. 4, 1987

Before EDWARDS and WILLIAMS, Circuit Judges, and JOYCE HENS GREEN,* District Judge.

---

* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

Opinion for the Court filed by District Judge JOYCE HENS GREEN.

Dissenting opinion filed by Circuit Judge WILLIAMS.

JOYCE HENS GREEN, District Judge:

In *Hishon v. King & Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), the Supreme Court ruled for the first time that decisions concerning advancement to partnerships are governed by Title VII, 42 U.S.C. U.S.C. § 2000e, et seq., and must therefore be made without regard to race, sex, religion, or national origin. This case, the first challenge to a partnership denial to reach us since *Hishon*, presents several novel and important questions that arise from the application of federal employment discrimination law to collegial bodies such as partnerships. Following a five-day trial, the District Court found that Price Waterhouse, one of the nation's largest accounting firms, had discriminated against plaintiff Ann Hopkins by permitting stereotypical attitudes toward women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner. The court concluded that Hopkins was entitled to an award of backpay from the date she should have been elected partner until the date of her resignation seven months later, but ruled that, notwithstanding the parties' agreement to defer consideration of damages until after a decision on the issue of liability, Hopkins' failure to present any evidence as to the amount of compensation she was due barred her from recovering all damages save attorneys' fees. The trial court further found that Hopkins had failed to establish that she had been constructively discharged following Price Waterhouse's failure to make her a partner, and thus declined to award her backpay for the period subsequent to her resignation or to order Price Waterhouse to invite her to become a partner. The parties cross-appealed.[1] For

[1] For the sake of convenience, the court will refer to the parties as plaintiff and defendant, rather than appellant, cross-appellee, and appellee, cross-appellant.

the reasons set forth below, we affirm the District Court's determination of liability, but reverse its judgment as to the appropriate relief and remand for further proceedings on this issue.

I.

A. *Background*

Price Waterhouse is a professional partnership specializing in auditing, tax, and management consulting services, primarily for private corporations and government agencies. The firm is known colloquially as one of the nation's "big eight" accounting firms; at the time this suit commenced, it had 662 partners working in 90 offices across the country. Price Waterhouse is managed by a Senior Partner and Policy Board elected by all the partners. New partners are regularly drawn from the ranks of the firm's senior managers through a formal nomination and review process that culminates in a partnership-wide vote. There are no formal limits on the number of persons who may be made partners in any one year. *Hopkins v. Price Waterhouse*, 618 F.Supp. 1109, 1111 (D.D.C.1985).

Plaintiff joined Price Waterhouse as a manager in August 1978 and began working in its Office of Government Services (OGS) in Washington, D.C. She specialized in preparing, securing, and managing contracts for large-scale computer-based systems designed specifically for government agencies. Plaintiff had previously worked at Touche Ross, another large accounting firm where her husband was also employed, but left because that firm's rules prohibited both husband and wife from being considered for partnership. Shortly after her departure, plaintiff's husband became a partner at Touche Ross. In order to hire her, Price Waterhouse waived one of its own rules that barred employment of anyone whose spouse was a partner in a competing firm. In 1981, however, the firm advised plaintiff that, because of her husband's position at Touche Ross, she would not be eligible for partnership at Price Waterhouse. She threatened to re-

sign and the matter was resolved only because Hopkins' husband left Touche Ross to set up his own consulting firm. Plaintiff was nominated for partnership a year later, in August 1982.

There is no dispute that Hopkins was qualified for partnership consideration. She was exceptionally successful in garnering business for the firm, winning contract awards with the Department of State and the Farmers Home Administration worth an estimated $34 to $44 million to Price Waterhouse. The firm's Senior Partner, Joseph Connor, characterized one of these contracts—a world-wide computerized system capable of handling all State Department financial transactions—as a "leading credential" that enabled the firm to win similar business from other federal agencies. The District Court expressly found that none of the other candidates considered for partnership in 1983 had generated more business for Price Waterhouse than plaintiff. 618 F.Supp. at 1112. In addition, she billed more hours than any of the other candidates under consideration.

The partners in OGS formally initiated the admission process for plaintiff by nominating her for partnership in August 1982. In support of her candidacy OGS submitted a flattering appraisal of her work, highlighting her "outstanding performance" in connection with the State Department project, and strongly urging her admission to the partnership. The appraisal stated in part:

> In her five years with the firm, she has demonstrated conclusively that she has the capacity and capability to contribute significantly to the growth and profitability of the firm. Her strong character, independence and integrity are well recognized by her clients and peers. Ms. Hopkins has outstanding oral and written communication skills. She has a good business sense, and ability to grasp and handle quickly the most complex issues, and strong leadership qualities.

Plaintiff's Exhibit ("Pl.Ex.") 15.

After a local office such as OGS nominates one of its senior managers for partnership, Price Waterhouse circulates the nominee's name and the accompanying appraisal of his or her work to all partners, who are invited to comment on the candidate. Those partners who have worked closely or extensively with a candidate submit "long-form" evaluations, while those whose contact has been more limited submit "short-forms." Partners are asked to rank individual nominees against all other candidates in 48 categories; to indicate whether the individual should be admitted, rejected, or placed on hold; and to provide written comments explaining their recommendations. The Admissions Committee, an arm of the firm's Policy Board, reviews each candidate's personnel file and occasionally interviews individual partners who have commented on a given candidate. The Committee then prepares a summary of the evaluations and makes its own recommendations to the Policy Board, providing a short written statement explaining any recommendation to hold or reject a candidate. The Policy Board in turn votes on whether the candidate should be included on the partnership ballot, held for reconsideration, or rejected. The Board can override the recommendations of the Admissions Committee and evaluates candidates not only on the basis of their individual merit, but also in terms of the firm's business needs. Those candidates who receive the Board's approval are placed on the ballot for a partnership-wide election; those who are not included are informed of the Board's reasons for rejecting or postponing their candidacies.

Plaintiff was the only woman among the 88 candidates nominated for partnership in August 1982. Of these, 47 were invited to join the partnership, 21 were rejected outright, and the remaining 20—including plaintiff—were placed on hold. Seventeen of the 19 men placed on hold were renominated the following year (the other two had been placed on two-year holds), and of these, 15 were ultimately admitted. OGS, however, did not renominate plain-

tiff. Of the thirty-two partners who submitted evaluations and comments on her candidacy, fully a fourth opposed her admission; another three partners recommended that she be held for reconsideration; and eight others stated that they lacked a sufficient basis upon which to form an opinion. 618 F.Supp. at 1113. Many of the comments from evaluating partners centered on Hopkins' apparent difficulties with staff, and both supporters and opponents of her candidacy characterized her as sometimes overly aggressive, unduly harsh, impatient with staff, and very demanding.

A number of these complaints about plaintiff's lack of "interpersonal skills" were couched in terms of her sex. One critic suggested that Hopkins needed to take a "course at charm school." Pl.Ex. 21. A supporter sought to excuse her behavior by speculating that "she may have overcompensated for being a woman." Defendant's Exhibit ("Def.Ex.") 31. A member of the Admissions Committee investigated a reference in Hopkins' personnel file about her use of profanity and testified that "several . . . partners" regarded her language as "one of the negatives." Transcript of Trial ("Tr.") 321. One supporter felt compelled to defend her on this subject, arguing that "[m]any male partners are worse than Ann (language and tough personality)"; this partner believed that the concerns over her profanity arose only "because she is a lady using foul language." *Id.* Another supporter opined that Hopkins initially came across as "macho," but concluded that "if you get around the personality thing she's at the top of the list or way above average." Still another supporter wrote that plaintiff "had matured from a tough-talking, somewhat masculine hard-nosed mgr. to an authoritative, formidable, but much more appealing lady partner candidate." Pl.Ex. 21.

Due to the large number of comments concerning her interpersonal skills, the Admissions Committee recommended that Hopkns' candidacy be held for at least a

year. The Policy Board concurred, noting that although plaintiff had "a lot of talent," she needed "social grace." Pl.Ex. 20. Shortly thereafter, plaintiff met with the firm's Senior Partner, Joseph Connor, to discuss the Board's decision, and he urged her to undertake a Quality Control Review, which would allow her to work with more partners, demonstrate her skills, and allay concerns about her ability to deal with staff. Prior to that meeting, Thomas Beyer, the head partner at OGS and perhaps Hopkins' most fervent supporter, discussed with her problems the Board had identified with her candidacy and the steps she might take to enhance her partnership prospects. Beyer advised her "to walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 618 F.Supp. at 1117.

Four months after she embarked on her Quality Control Review, however, the partners at OGS decided not to propose Hopkins for partnership. During the year following her initial nomination, Hopkins lost the support of two of these partners, who had come to strongly oppose her candidacy. Although candidates have on occasion been admitted despite the opposition of partners in their home offices, plaintiff's supporters at OGS felt that in view of the strong criticisms her earlier nomination had drawn, she could not possibly become a partner without the unanimous endorsement of her local office partners. Beyer advised plaintiff that it was very unlikely that she would ever be admitted to the partnership. He told her that she could remain at Price Waterhouse as a senior manager, but one of the OGS partners who opposed her candidacy advised her to resign. That advice was consistent with the regular practice and custom at Price Waterhouse, where candidates rejected for partnership routinely left. Hopkins resigned in January 1984 and set up her own consulting firm.

B. *Proceedings Below*

The District Court had no difficulty finding that plaintiff had presented a prima facie case of sex discrimination: she was a qualified partnership candidate, she was rejected, and Price Waterhouse continued to seek partners with her qualifications. 618 F.Supp. at 1113 (citing *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 875, 104 S.Ct. 2794, 2799, 81 L.Ed.2d 718 (1984); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981)). The court went on to find, however, that Price Waterhouse's consideration of Hopkins', or any other candidate's, interpersonal skills was a legitimate business inquiry, and that plaintiff's management style "provided ample justification for the complaints that formed the basis of the Policy Board's decision." 618 F.Supp. at 1114. The trial judge found that a number of the criticisms leveled at Hopkins because of her treatment of staff were in fact genuine. *Id.* In addition, the trial court concluded that the opposition of the two OGS partners to Hopkins' renomination was likewise based on genuine reservations about her management style rather than any animosity towards her because of her sex. *Id.* Finally, the District Court rejected Hopkins' contention that Price Waterhouse treated her differently than male candidates with abrasive or aggressive personalities. The trial judge concluded that the firm had legitimate, nondiscriminatory business reasons for admitting two such candidates identified by plaintiff, and dismissed evidence she proffered as to the two other male candidates as "fragmentary" and otherwise insufficient proof of disparate treatment.[2] *Id.* at 1115 & n. 6.

---

[2] The District Court also rejected Hopkins' evidence concerning the very small number of female partners at Price Waterhouse. The trial court found this evidence "wholly inconclusive" because it failed to indicate the percentage of female partners relative to the percentage of available qualified women, and failed to take into account the fact that female partners presently at Price Waterhouse were selected over a long span of years during which the pool of qualified women changed dramatically. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1116 (D.D.C. 1985).

The trial court's finding of liability rested instead on its determination that Price Waterhouse had discriminated against Hopkins by filtering her partnership candidacy through a system that gave great weight to negative comments and recommendations, despite evidence that those comments reflected unconscious sexual stereotyping by male evaluators based on outmoded attitudes towards women. *Id.* at 1118-19. The District Court found that comments based on sexual stereotypes were "part of the regular fodder of partnership evaluations," yet Price Waterhouse took no steps to discourage sexism, to heighten the sensitivity of partners to sexist attitudes, or to investigate negative comments to ascertain whether they were the product of such attitudes. *Id.* at 1119. The trial judge acknowledged that it was impossible to measure the precise role sexual stereotyping had played in the Policy Board's decision to deny Hopkins partnership, but found that the decision was in fact tainted by discriminatory evaluations that resulted from the firm's failure to root evident sexism from its evaluation system. Accordingly, the District Court determined that Price Waterhouse bore the burden of demonstrating by clear and convincing evidence that its decision would have been the same regardless of such discrimination—a showing the firm was unable to make.

Having concluded that Hopkins was a victim of sexual discrimination, the trial judge went on to find that she was nevertheless not entitled to an order directing the firm to make her a partner. Applying the doctrine of constructive discharge to the professional partnership setting, the District Court determined that Hopkins' departure from Price Waterhouse was the result of neither intolerable working conditions nor any aggravating cir-

cumstances such as a firm history of discrimination or undue humiliation. *Id.* at 1121. Although one OGS partner suggested to plaintiff that she resign, the firm offered to retain her as a senior manager and several partners encouraged her to accept this option. Aside from her failed partnership bid, Hopkins had enjoyed an amicable and otherwise quite successful five years of employment with the firm. The trial court concluded that a discriminatory denial of partnership, without more, did not amount to a showing of constructive discharge and thus did not warrant the equitable relief Hopkins sought. Accordingly, the court denied her both backpay from the date of her resignation and a decree requiring that she be invited to join Price Waterhouse as a partner. The District Court also ruled that although plaintiff had demonstrated her entitlement to an award of backpay compensating her at the partnership salary for the period between her partnership denial and her resignation, she had failed to offer any evidence as to the amount of compensation she should receive. The trial judge acknowledged that this failure was due solely to a stipulation the parties filed in which they agreed to defer resolution of the backpay issue until after the court rendered its liability determination; because that stipulation was filed without the court's knowledge or approval, however, he deemed the issue closed and refused to accept any post-trial evidence on the question. The court therefore awarded Hopkins judgment in the amount of her attorneys' fees only.

The respective cross-appeals followed.

II.

A. *The Liability Determination*

Price Waterhouse mounts two attacks on the District Court's determination that it discriminated against Hopkins in violation of Title VII. First, the firm contends

that there is no competent evidence supporting the lower court's finding that impermissible sexual stereotyping infected the partnership evaluation system. Second, Price Waterhouse argues that even if this finding is upheld, the liability determination still cannot stand because the lower court expressly found that Hopkins' behavior provided "ample justification" for the complaints about her lack of interpersonal skills, and that these complaints in turn constituted a legitimate, nondiscriminatory business reason for placing Hopkins' candidacy on hold. Thus, the firm submits that even if the evaluation process has not been purged of sexist attitudes, those attitudes were not responsible for the decision to hold Hopkins for further consideration, and therefore Hopkins has failed to establish any causation between the partnership's inappropriate treatment of female candidates and her own unsuccessful candidacy.

1. *The District Court's Findings*

As this court recently emphasized, appellate review of District Court findings in Title VII cases is necessarily narrow. *Underwood v. District of Columbia Armory Board*, 816 F.2d 769, 774 (D.C.Cir.1987). In order to overturn a determination of liability, we must conclude that it is " 'based on an utterly implausible account of the evidence.' " *Id.* (quoting *Bishopp v. District of Columbia*, 788 F.2d 781, 786 (D.C.Cir.1986)). Faced with this formidable hurdle, Price Waterhouse eschews any intention of re-arguing its case on appeal: it purports to urge reversal not on the ground that the lower court's view of the evidence is implausible, but on the theory that there simply is no evidence supporting the District Court's finding of discrimination. Notwithstanding its disclaimer, however, defendant's attempt to demonstrate the absence of competent evidence proves, upon closer inspection, to be nothing more than a thinly disguised quarrel with the District Court over appropriate inferences to be drawn from the evidence before it. Given

our narrow scope of review, and the reasonableness of the District Court's findings, we must reject that attempt.

In concluding that Price Waterhouse's partnership evaluation system was infected by impermissible, sexually stereotyped attitudes toward women, the District Court relied on three principal pieces of evidence: (1) the comments partners made about Hopkins herself; (2) the testimony of Dr. Susan Fiske, a social psychologist and an expert in the field of stereotyping, who identified some of these comments as the product of sexual stereotyping; and (3) comments made about other women candidates in previous years. Defendant attempts to dismiss this evidence by isolating various comments and arguing that they are either irrelevant, sex-neutral, or otherwise not probative of discrimination. This piecemeal attack on the District Court's finding, however, ignores the fact that we must view the evidence in its entirety, and is in any event unequal to the task of demonstrating that the court's finding is clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985).

Price Waterhouse argues, for example, that the District Court could not have drawn any adverse inferences about the firm's evaluation system from statements describing Hopkins as "macho," "a somewhat masculine hard-nosed mgr," or a manager who "overcompensated for being a woman," because all these comments were made by those favoring her candidacy. That Hopkins' supporters made these statements, however, in no way undermines the District Court's finding that they reflect stereotypical thinking on the part of the commenters. Stereotypical attitudes that sometimes work to the advantage of women, such as the once unchallenged assumption that mothers are inherently superior parents and thus nearly always entitled to custody of children in divorce actions, are no less the product of archaic thinking than those attitudes that disadvantage women. The comments of Hopkins'

supporters may or may not have harmed her candidacy,[3] but they are most certainly competent evidence that sexist attitudes were present in the partnership selection process. Price Waterhouse also suggests that one partner's comment that Hopkins needed to take a "course at charm school" is not sex-indicative, because charm is a quality admired both in men and women. This argument borders on the facetious. Charm is indeed an attribute prized in men and women alike, but charm schools are and always have been exclusively female institutions.[4] The sexist import of the comment is patently clear, particularly as charm schools are inextricably linked, both historically and philosophically, with the antiquated notion that women should devote their energies to social and cultural affairs rather than business or professional endeavors. *See* note 4 *supra*.

Perhaps most telling is Price Waterhouse's desperate attempt to erase from the record Thomas Beyer's advice

---

[3] We do not share Price Waterhouse's emphatic conviction that because the comments in question were made by her supporters, they could not possibly have hurt Hopkins' partnership prospects. Characterizing a female candidate as "macho" and "masculine" is certainly one way of qualifying, and thereby diluting, an endorsement. Supporters of a male candidate are very unlikely to describe that candidate in sexual terms, *i.e.*, as "masculine," or to excuse character flaws as merely the result of "overcompensating for being a man." Indeed, plaintiff's expert, Dr. Fiske, testified that these qualifying statements reflected a conscious effort on the part of the commenters to overcome their stereotypical attitudes and vote for Hopkins despite their disdain for her behavior. Tr. 565. By couching their qualifications in terms of sexual stereotypes, however, these supporters echoed the complaints of Hopkins' critics, thereby lending credence to those complaints and unwittingly undermining the support they sought to provide.

[4] "Charm school" is a somewhat derogatory colloquialism for an institution formally known as a "finishing school." Webster's defines the latter as "a private school that prepares young women for social life (by emphasizing cultural accomplishments and social graces) rather than for a vocational or professional career." Webster's Third International New Dictionary (1968).

to Hopkins that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 618 F.Supp. at 1117. The firm argues that the District Court erred in stating that Beyer was "responsible for telling her what problems the Policy Board had identified with her candidacy." *Id.* Price Waterhouse claims that this task officially fell to the firm's Senior Partner, Joseph Connor, who made no reference to Hopkins' femininity in his meeting with her following the Policy Board's decision to hold her candidacy. This contention not only rests on the artificial assumption that Beyer, the chief partner in Price Waterhouse's Washington office and Hopkins' leading supporter, would be kept completely in the dark as to the Policy Board's views on her candidacy, but is directly contradicted by the testimony of Roger Marcellin, a member of both the Policy Board and the Admissions Committee at the time of Hopkins' nomination, who stated that he had "no doubt that Tom Beyer would be the one that would have to talk with her [Hopkins]. He knew exactly where the problems were." Tr. 316. Beyer's advice, of course, speaks for itself. That he ardently supported her candidacy and had every motive to give her what he hoped would be helpful counsel simply underscores the genuineness of his belief that Hopkins' failure to behave in a manner apparently expected of a woman by Price Waterhouse partners had damaged her partnership bid.

The District Court also rested its finding of discriminatory sexual stereotyping on the testimony of Dr. Fiske, an expert in the field of stereotyping, who stated that the disappointed stereotypical expectations of male partners played a "major determining role" in the firm's decision not to make Hopkins a partner. Tr. 545. Disclaiming any intention of denigrating Dr. Fiske's field of expertise, Price Waterhouse attempts to dismiss this evidence as "sheer speculation" of "no evidentiary value." Brief for

Appellee-Cross Appellant at 31. This is so, the firm contends, because Dr. Fiske failed to compare the stereotypical comments made about Hopkins with similar comments made about male candidates; she lacked information concerning the authors of these comments; and she had never met Hopkins and had no idea what her conduct or behavior was like. However useful Price Waterhouse might believe this information to be, Dr. Fiske made clear that experts in her field do not require such data in order to determine whether stereotyping is occurring in a given employment context. Dr. Fiske testified that she was an expert at evaluating written comments, that reliance on such written documents was a standard practice in her field, and that she did not need to observe Hopkins or meet her critics because she had the entire universe of reactions to Hopkins before her, as well as comments the same partners made about male candidates. Tr. 595-96. This information, along with other "convergent indicators" or stereotyping—such as the extremely small number of female partners at the firm; the absence of any other female candidates among the 88 nominated along with Hopkins; the exaggerated and extremely intense negative reactions of Hopkins' critics to behavior that supporters perceived as positive; the ambiguous criteria the firm used to evaluate a candidate's personal qualities; the absence of complaints from Hopkins' clients; and the positive assessments of Hopkins in areas where performance could be measured objectively, (*e.g.*, business generation)—taken together provided Dr. Fiske a sufficient basis from which to draw her conclusions that Hopkins was the victim of stereotyping. To the extent that Price Waterhouse believes Dr. Fiske lacked necessary information, the firm is in fact quarreling with her field of expertise and the methodology it employs. Defendant, however, failed to challenge the validity of Dr. Fiske's discipline at trial and disavows any such challenge here. We cannot find any error in the District Court's decision to credit Dr. Fiske's testimony as that of an expert, or

the decision to rely on that testimony as evidence of sexual stereotyping at Price Waterhouse.

Finally, the firm challenges the District Court's reliance on comments partners made about other female candidates, contending that the trial judge intentionally misconstrued these statements in order to find in them evidence of stereotypical thinking. One partner stated that he could never vote for a female partner. One successful female candidate was criticized for being a "women's libber," and two other unsuccessful women were characterized as curt, brusque, and abrasive; "Ma Barker"; and "one of the boys." 618 F.Supp. at 1117. It is of course impossible to misconstrue the sentiment behind a categorical opposition to all female partnership candidates. Despite the fact that the firm took no steps to admonish this partner for his statement, which he made just one year before Hopkins came up for consideration, Price Waterhouse suggests the comment is essentially irrelevant because it was obviously ignored by the Policy Board and was "of no further concern . . . by the time that plaintiff was proposed." Brief for Appellee-Cross Appellant at 37. The firm also argues that the comment about one candidate being a "women's libber" cannot be viewed as evidence of discrimination because the woman in question became a partner; Price Waterhouse similarly attempts to dismiss the references describing one woman as "Ma Barker" and "one of the boys" as comments utterly devoid of stereotypical attitudes, reflecting nothing more than the author's view that this particular woman was a "hick" who socialized too often with non-professional staff. These arguments miss the mark. The District Court did not purport to find that any of these comments determined the fate of the women in question, reflected the views of the Policy Board itself, or had a direct impact on plaintiff's candidacy. Rather, the court relied on them as evidence that partners at Price Waterhouse often evaluated female candidates in terms of their

sex. We find nothing erroneous in such reliance; on the contrary, we believe it is eminently correct.

In sum, there is ample support in the record for the District Court's finding that the partnership selection process at Price Waterhouse was impermissibly infected by stereotypical attitudes towards female candidates.

2. *The District Court's Legal Theory*

Price Waterhouse also challenges the liability determination below on two purely legal grounds. First, it contends that Hopkins did not prove "intentional" discrimination on the part of the Policy Board, but only "unconscious" sexual stereotyping by unidentified partners who participated in the selection process. Second, the firm argues that even if such a showing is sufficient to satisfy Title VII's intent requirement, Hopkins did not prove, and the District Court did not find, that this unconscious stereotyping, or the firm's conscious failure to prevent it, actually caused her partnership denial.

Hopkins claimed, and the District Court found, that Price Waterhouse treated her differently than the 87 male candidates nominated in 1982 by subjecting her candidacy to an evaluation system that the firm knew or should have known allowed sexual stereotypes to influence decisions on partnership selection. She made a substantial showing of the role such sexual stereotypes played in the selection system generally and in her own candidacy in particular —a showing made all the more remarkable by the educational background and sophistication of the participants in that system. Price Waterhouse tries to escape liability for this sex-based disparate treatment by arguing that it was not "intentional"—the individual partners who evaluated plaintiff on the basis of stereotypes did so unconsciously, and plaintiff failed to show the extent to which this stereotyping influenced the ultimate decision-maker in this case, the Policy Board. In so arguing, defendant seeks refuge in the collegial nature of its decision-

making body, in the subtle and insidious nature of the discrimination involved, and in a mistaken notion of the intent requirement in disparate treatment cases.

As the Supreme Court noted a decade ago in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), disparate treatment is a type of intentional discrimination whereby an "employer simply treats some people less favorably than others *because* of their race, color, religion, sex or national origin. Proof of discriminatory motive is crucial, *although it can in some situations be inferred from the mere fact of differences in treatment.*" *Id.* at 335-36 n. 15, 97 S.Ct. at 1854 n. 15 (emphasis added). Title VII is, of course, remedial rather than punitive in nature. It is designed to remove " 'artificial, arbitrary and unnecessary barriers to employment where those barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.' " *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-01, 93 S.Ct. 1817, 1823, 36 L.Ed.2d 668 (1973) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971)). In keeping with this purpose, the Supreme Court has never applied the concept of intent so as to excuse an artificial, gender-based employment barrier simply because the employer involved did not harbor the requisite degree of ill-will towards the person in question. As the evidentiary framework established in *McDonnell Douglas* makes clear, the requirements of discriminatory motive in disparate treatment cases does not function as a "state of mind" element, but as a method of ensuring that only those arbitrary or artificial employment barriers that are related to an employee or applicant's race, sex, religion, or national origin are eliminated.[5] Nor is this surprising, as unwitting or

[5] In *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the Supreme Court noted that an employer's erroneous assessment of a protected applicant's qualifications does not, by itself, subject the employer to Title VII liability. Such an assessment is of course an arbitrary employment barrier, but it is not based on the applicant's race, sex, religion, or national origin and is thus not within the scope of the statute. *Id.* at 259, 101 S.Ct. at 1096.

ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination.[6] Hopkins demonstrated, and the District Court found, that she was treated less favorably than male candidates because of her sex. This is sufficient to establish discriminatory motive; the fact that some or all of the partners at Price Waterhouse may have been unaware of that motivation, even within themselves, neither alters the fact of its existence nor excuses it. *See Lynn v. Regents of the University of California*, 656 F.2d 1337, 1343 n. 5 (9th Cir.1981) ("when plaintiffs establish that decisions regarding . . . employment are motivated by discriminatory attitudes relating to race or sex, or are rooted in concepts which reflect such attitudes, however subtly, courts are obligated to afford the relief provided by Title VII"), *cert. denied*, 459 U.S. 823, 103 S.Ct. 53, 74 L.Ed.2d 59 (1982).

Price Waterhouse nevertheless argues that Hopkins has failed to establish a discriminatory motive on the part of the actual decisionmaker in this case, the Policy Board, because she has not demonstrated the exact impact that stereotyped comments had on the Board's ultimate decision. The faulty logic upon which this contention is

[6] In *Lynn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 459 U.S. 823, 103 S.Ct. 53, 74 L.Ed.2d 59 (1982), the Ninth Circuit observed that it was once accepted wisdom that women were unfit to vote, practice law, or undertake professional careers. These beliefs were no less pernicious merely because those subscribing to them may not have suspected their own discriminatory attitudes. Today "[o]ther concepts reflect a discriminatory attitude more subtly; the subtlety does not, however, make the impact less significant or less unlawful. It serves only to make the courts' task of scrutinizing attitudes and motivation, in order to determine the true reason for employment decisions, more exacting." *Id.* at 1343 n.5.

premised, however, would, if accepted, place an enormous, perhaps insurmountable, burden on Title VII litigants who challenge the employment decisions of collegial bodies such as partnerships. It is the rare case indeed in which a group of sophisticated professionals such as the Policy Board would formally pass on the candidacy of a woman or other member of a protected group in the unvarnished terms of the Price Waterhouse partner who objected to all female candidates as a matter of principle. Here, Hopkins presented evidence that stereotypical attitudes towards women had manifested themselves in connection with the partnership bids of other women and, more importantly, that these stereotypes had been brought to bear on her own candidacy. In addition, she offered the expert testimony of Dr. Fiske, who concluded that these attitudes played a "major" role in plaintiff's failure to make partner. In particular, Dr. Fiske noted that these stereotypical attitudes accounted for the extremely negative reactions of Hopkins' critics to behavior that other partners praised in her—negative reactions, moreover, which the Policy Board formally recognized in its recommendation by stating that plaintiff needed to learn social grace. The District Court therefore had ample support for its conclusion that stereotyping played a significant role in blocking plaintiff's admission to the partnership.

In *Burdine*, of course, the Court made clear that ultimately the plaintiff bears the burden of persuasion on the issue of intentional discrimination. While the Court noted that this burden requires the plaintiff to prove that "a discriminatory reason more likely motivated the employer," 450 U.S. at 256, 101 S.Ct. at 1095, it has never ruled definitively that the plaintiff must establish that impermissible discrimination was the predominant or "but for" motivating factor,[7] and the circuits have divided on

[7] In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976), the Court stated in a footnote that, for purposes of proving pretext, a Title VII plaintiff need not prove that race was the "sole" basis of the adverse employment action, adding that "no more is required to be shown than that race was a 'but for' cause." *Id.* at 282 n.10. Significantly, "[t]he 'no more need be shown' phrase indicates that a showing of but for causation would be *sufficient*; it does not signify that such a showing is *necessary* to prevail." *Lewis v. University of Pittsburgh*, 725 F.2d 910, 921 (3d Cir. 1983) (Adams, J., dissenting), *cert. denied*, 469 U.S. 892, 105 S.Ct. 266, 83 L.Ed.2d 202 (1984) (emphasis in original). Neither the majority of circuit courts nor the commentators that have addressed the question have viewed the *McDonald* footnote as definitive. *See* note 8 *infra and* Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 Col.L.Rev. 292, 302 (1982).

More recently, the Court ruled in an analogous setting that for purposes of establishing an unfair labor practice under the National Labor Relations Act, a showing that antiunion bias was a substantial or motivating factor in an adverse employment decision is sufficient to shift to the employer the burden of proving that the decision would have been the same even absent such bias. *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983). The Court noted that in such mixed-motive cases, "[i]t is fair that [the] employer bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing." *Id.* at 403, 103 S.Ct. at 2475.

[8] Only two circuits have adopted the "but for" test of causation. *See Lewis v. University of Pittsburgh*, 725 F.2d 910, 915-17 (3d Cir. 1983) and *Mack v. Cape Elizabeth School Bd.*, 553 F.2d 720, 722 (1st Cir. 1977). Four others have adopted a "substantial factor" test under which race or sex need not be *the* determinative factor, as long as it had a substantial impact on the decision in question. *See Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 712 (6th Cir. 1985) (plaintiff must show employer's decision "more likely than not" motivated by impermissible criterion); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 875 n. 9 (11th Cir. 1985) (plaintiff must show discriminatory motive was "significant or substantial factor" in employment decision); *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1166 (9th Cir. 1984) (liability may be imposed on finding that sex was a "significant factor"); *Whiting v. Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir. 1980) (discrimination must be a "significant factor"). The Eighth Circuit has

the question.[8] *McDonnell Douglas* and *Burdine* set out the

analytical framework necessary to establish intentional discrimination when there is no direct evidence of such discrimination and, consistent with this analysis, it is inappropriate to require the defendant, simply on the basis of the inference of discrimination raised by plaintiff's prima facie case, to prove that discrimination was not the but for cause of the challenged employment decision. *See Toney v. Block*, 705 F.2d 1364, 1367-68 (D.C. Cir.1983). Here. however, Hopkins has offered direct evidence that her gender was a significant motivating factor in her failure to make partner, and Price Waterhouse's claim that it had other legitimate reasons for its decision in no way negates her showing. At this point, the utility of the *McDonnell Douglas-Burdine* analysis is at an end, for the question is no longer whether plaintiff was "treat[ed] . . . less favorably than others because of . . . [her] sex," *Teamsters*, 431 U.S. at 335-36 n. 15, 97 S.Ct. at 1854 n. 15, but rather whether that less favorable treatment in fact caused the adverse decision she challenges.

Recognizing that "[d]iscriminatory intent is simply not amenable to calibration," *Personnel Administrator v. Feeney*, 442 U.S. 256, 277, 99 S.Ct. 2282, 2295, 60 L.Ed. 2d 870 (1979), courts have struggled to resolve the difficult questions of causation that arise in mixed-motive cases such as this. While most circuits have not confronted the question squarely, the consensus among those that have is that once a Title VII plaintiff has demonstrated by direct evidence that discriminatory animus played a significant or substantial role in the contested employment decision, the burden shifts to the employer

---

adopted an even less stringent standard that permits a plaintiff to establish Title VII liability simply by showing that an unlawful motive "played *some part* in the employment decision." *Bibbs v. Block*, 778 F.2d 1318, 1323 (8th Cir. 1985) (en banc) (emphasis added). This circuit has not yet resolved the question. *See American Federation of Government Employees v. FLRA*, 716 F.2d 47, 51 n.2 (D.C. Cir. 1983).

to show that the decision would have been the same absent discrimination. *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 712 (6th Cir.1985) (where plaintiff shows by preponderance of evidence that decision more likely than not motivated by impermissible criterion, burden shifts to employer to show decision would have been the same); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 875 n. 9 (11th Cir. 1985) (if plaintiff offers direct evidence that discrimination was substantial factor in decision, burden shifts to employer to show decision would have been the same absent discrimination); *see also Bibbs v. Block*, 778 F.2d 1318, 1323-24 (8th Cir.1985) (en banc) (once plaintiff shows unlawful motive played some part in decision, liability is established; defendant may limit relief by showing decision would have been the same absent discrimination); *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1166 (9th Cir.1984) (where plaintiff shows unlawful motive was a significant factor, liability is established; defendant may limit relief by demonstrating decision would have been the same absent discrimination). *But see Lewis v. University of Pittsburgh*, 725 F.2d 910, 915-16 (3d Cir.1983) (plaintiff must show discriminatory animus was the but for cause of decision), *cert. denied*, 469 U.S. 892, 105 S.Ct. 266, 83 L.Ed.2d 202 (1984). We believe that where a Title VII plaintiff has already discharged her burden of demonstrating that the employment decision was based on impermissible bias,

> it is unreasonable and destructive of the purposes of Title VII to require the plaintiff to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in [her] favor. We chose instead to place the burden upon the employer to show, by "clear and convincing evidence," that the unlawful factor was *not* the determinative one.

Toney v. Block, 705 F.2d at 1366 (emphasis in original).[9] This, of course, is precisely the rule the District Court applied below. We believe this burden-shifting mechanism is appropriately invoked in a mixed-motive case such as this, and accordingly we find no error in the District Court's allocation of burdens.

Finally, Price Waterhouse argues that the District Court's findings conclusively demonstrate that Hopkins' unappealing personality, rather than any unlawful discrimination on the part of the Policy Board, was the but for cause of her failure to make partner. The trial judge expressly noted that the concerns raised over Hopkins' dealings with staff found support in the record and "provided ample justification for the complaints that form the basis of the Policy Board's decision." 618 F.Supp. at 1114. Moreover, the judge acknowledged that because of Hopkins' apparent lack of interpersonal skills, "the Court cannot say that she would have been elected to partnership if the Policy Board's decision had not been tainted by sexually biased evaluations." *Id.* at 1120. Contrary to Price Waterhouse's contentions, however, these statements are not inconsistent with the court's liability determination. On the contrary, they are perfectly in keeping with the fact that this is a case of mixed-motivation. The District Court simply found that both plaintiff's personality and the sexually stereotyped reactions to her personality were significant factors in the firm's decision to hold her candidacy. Because Price Waterhouse could not demonstrate by clear and convincing evidence that impermissible bias was not the determinative factor, however, the District Court properly found for Hopkins on the question of liability.

[9] In *Toney*, the court declined to apply this test, originally set out in *Day v. Mathews*, 530 F.2d 1083 (D.C. Cir. 1976), to an individual claim of disparate treatment. The court noted that the *Day v. Mathews* test was typically applied in disparate impact class actions in which the class plaintiffs prevailed simply by showing generalized discrimination in the employment unit, without demonstrating that each individual class member had actually suffered directly from that discrimination. In *Toney*, the plaintiff, in accordance with *Burdine*, had relied on circumstantial evidence of discrimination "in the air" to prove his prima facie case. As we noted above, in such circumstances it is inappropriate to shift to the employer the burden of proving that discrimination was not the determinative cause of the adverse decision. Here, however, Hopkins has shown by direct evidence not just "background noise" of discrimination, but that "unlawful discrimination had been applied against [her] *in the particular employment decision [at issue]*." *Toney*, 705 F.2d at 1366 (emphasis in original). As we explain above, this crucial finding justifies the burden-shifting rule we apply in this case.

B. *Relief*

Turning to the question of relief, the District Court found that Hopkins was entitled to recover backpay from the date of her partnership denial until the date of her resignation, but disallowed any such recovery because the parties had attempted to bifurcate the trial and postpone consideration of the issue of damages without the knowledge or consent of the court. With respect to post-designation damages, the District Court found that Hopkins had failed to demonstrate that she had been constructively discharged and therefore was ineligible both for backpay subsequent to the date of her resignation and an order directing that she be made a partner.

The facts Hopkins proffered in support of her constructive discharge claim are undisputed. She made clear both at trial and during the course of her employment with Price Waterhouse that consideration for partnership was an absolute prerequisite for any job she would take. Indeed, she left Touche Ross when her husband's successful partnership bid eliminated her own chances for partnership, and she threatened to resign in 1981 when Price Waterhouse suggested that her husband's status as a Touche Ross partner might preclude her consideration for partnership at the firm. Nor does defendant take issue in any way with the District Court's finding that following her initial failure to make partner and OGS's decision

not to re-propose her, it was "very unlikely" that Hopkins would ever become a partner at Price Waterhouse. It is true that plaintiff could have stayed on at the firm as a senior manager and that at least one partner urged her to do so. On the other hand, the customary and nearly unanimous practice at Price Waterhouse, as at most other accounting firms, is for senior managers who have been passed over for partnership to resign, and one of the OGS partners who strongly opposed Hopkins' candidacy advised her to do just that.

In ruling that this showing did not suffice to make out a claim of constructive discharge, the District Court relied on *Clark v. Marsh*, 665 F.2d 1168 (D.C.Cir.1981), where this court stated that in order to prevail on such a claim, an employee must establish that the employer "deliberately made . . . working conditions intolerable and drove [the employee] into 'an involuntary quit.'" *Id.* at 1176 (quoting *Retail Store Employees Union Local 880 v. National Labor Relations Board*, 419 F.2d 329, 332 (D.C.Cir.1969)). We agree that taken at face value, this language sets forth a stringent standard. We believe that the District Court's literal interpretation of that language was misplaced, however, in view of the underlying facts in *Clark*, as well as decisions in cases following it. To begin with, a number of cases, including one relied upon by this court in *Clark*, have rejected the notion that the employer must have the specific intent of forcing the employee to quit. *See, e.g., Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir.1984); *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir.1982); *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 66 (5th Cir.1980). These courts have instead held that it is sufficient if the employer simply tolerates discriminatory working conditions that would drive a reasonable person to resign. In addition, *Clark* and cases subsequent to it reveal that the intolerableness of working conditions is very much a function of the reasonable expectations of the employee, including expectations of

promotion or advancement. Thus, in *Clark*, the court noted that the plaintiff, like Hopkins here, "reasonably expected . . . opportunities for advancement" and that the employer's actions "essentially locked [her] into a position from which she could apparently obtain no relief." 665 F.2d at 1174. Similarly, in *Parrett v. City of Connersville Indiana*, 737 F.2d 690 (7th Cir.1984), *cert. denied*, 469 U.S. 1145, 105 S.Ct. 828, 83 L.Ed.2d 820 (1985), the Seventh Circuit found that plaintiff's transfer, without loss of pay, from chief of detectives to line captain, a dead-end position requiring plaintiff to do virtually nothing, was a form of enforced idleness both humiliating and detrimental to a person with the career goals and ambition of the plaintiff. And in *Goss*, the Third Circuit upheld a district court's finding that an employer's discriminatory transfer of plaintiff to a less lucrative sales territory, combined with its indifferent response to her protests of that action, so debilitated and humiliated her that it amounted to a constructive discharge. 747 F.2d 885. In each of these cases there were, of course, other indicia of discriminatory animus, but that is equally true here, where Hopkins faced the prospect of working with a number of partners, including two in her own office, who considered her brusque, abrasive, masculine, and overly aggressive.

We continue to adhere to the view, first set forth in *Clark*, that the mere fact of discrimination, without more, is insufficient to make out a claim of constructive discharge. Similarly, we believe that discrimination is still best attacked within the context of existing employment relations. Price Waterhouse's decision to deny Hopkins partnership status, however, coupled with the OGS's failure to renominate her, would have been viewed by any reasonable senior manager in her position as a career-ending action. Accordingly, it amounted to a constructive discharge. We believe the District Court erred in ruling otherwise and therefore reverse that portion of its decision and remand the case so that the court may con-

duct further proceedings in order to determine the appropriate relief.

In assessing Hopkins' post-resignation damages, the District Court must of necessity consider much if not all of the evidence plaintiff sought to introduce in connection with her claim for backpay for the period between her partnership denial and her resignation. We believe, therefore, that the District Court, in determining damages on remand, should also compensate Hopkins for this period. In so ruling, we do not wish to condone unauthorized bifurcation of Title VII or any other actions, nor are we confident that we would require such a re-determination were it not for our remand. The District Court itself, however, expressly found that Hopkins was entitled to recover pre-resignation damages, and there is no suggestion in the record that she was in any way responsible for the decision to postpone the presentation of evidence in this issue. We are somewhat troubled by the fact that the District Court's penalty for that decision fell solely on plaintiff and resulted in a complete windfall for Price Waterhouse, whose attorneys joined equally in the unauthorized stipulation. In any event, the discourtesy and inconvenience to the court occasioned by the stipulation is largely moot in light of our remand, and we therefore believe it appropriate for the court to award Hopkins the full relief to which she is entitled.

For all the foregoing reasons, we affirm the District Court's liability determination and reverse and remand the case for the determination of appropriate damages and relief.

WILLIAMS, Circuit Judge, dissenting:

The majority implicitly adopts a novel theory of liability under Title VII, but neither confronts the novelty of the theory nor gives it any intelligible bounds. Further, as it must to reach the result, it bends out of recognition this court's holding in *Toney v. Block*, 705 F.2d 1364 (D.C.Cir.1983). These prodigies are necessary for the outcome because the district court's judgment cannot be sustained under any hitherto accepted notion of Title VII liability.[1]

The theory is one of sexual stereotyping. *See, e.g.*, Majority Opinion ("Maj.") at 465, 468, 469. An analysis grounding Title VII liability in such stereotypes may well be meritorious; but its articulation would require care. No one argues that Congress intended entirely to overturn Justice Douglas's observation that "the two sexes are not fungible." *Ballard v. United States*, 329 U.S. 187, 193, 67 S.Ct. 261, 264, 91 L.Ed. 181 (1946). Dismissal of a male employee because he routinely appeared for work in skirts and dresses would surely reflect a form of sexual stereotyping, but it would not, merely on that account, support Title VII liability. Nor, I suppose, does anyone contend that use of the feminine pronoun "she" to describe a female is a forbidden "evaluat[ion of] female candidates in terms of their sex." Maj. at 468.

The court makes no effort to delineate the theory, to draw a line between permissible and impermissible. There is a good reason not to do so: the record here provided no causal connection between Hopkins's fate and such stereotyping as went on among Price Waterhouse's 662 partners. The evidence of sexual stereotyping[2] is carefully culled from a mass of critical comments on the plaintiff's abrasiveness with no sex link whatever. The district court determined that these comments were well founded in fact, represented standards applied to men and women alike, and were the true basis of the firm's

---

[1] The majority's treatment of the relief issues, however, seems correct.

[2] The line between legally permissible and legally impermissible stereotyping has yet to be drawn. When I use the term, I refer simply to whatever expressions have been so characterized by the district court or the majority.

decision. 618 F.Supp. at 1114-16. The questionable remarks consist, with one marginal exception, of two types. First, some of Hopkin's *supporters* used such stereotypes in speaking of her or in voicing their speculations as to the workings of her opponents' minds. Second, other partners had used such terms in *other* years in speaking of *other* female candidates. Thus, though some forms of sexual stereotyping can be discriminatory, the instances here, however they may be characterized, were at most "generalized discrimination within the employment unit," *Toney v. Block*, 705 F.2d at 1367, rather than discrimination "*in the particular employment decision for which retroactive relief was sought*," *id.* at 1366 (emphasis in original).

Under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981), and *Toney*, this can do no more than establish a *prima facie* case of discrimination. In functional terms, it put upon the defendant the burden of showing that its stated reasons were not pretextual. Defendant met that burden. The district court made unchallenged findings that the reasons given were "not fabricated as a pretext for discrimination." 618 F.Supp. at 1114. It also found that Price Waterhouse had "legitimate, nondiscriminatory reasons for distinguishing between the plaintiff and the male partners with whom she compares herself." *Id.* at 1115. This clearly restored the burden to plaintiff to show that she was the victim of unlawful discrimination. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095. The district court's findings that Hopkins's "conduct provided ample justification for the complaints [about her unpleasantness] that formed the basis of the Policy Board's decision," 618 F.Supp. at 1114, clearly shows that plaintiff did not meet that burden.

The district court summarized its view of the evidence of discrimination in these terms:

> Discriminatory stereotyping of females was permitted to play a part. [1] Comments influenced by sex stereotypes were made by partners; [2] the firm's evaluation process gave substantial weight to these comments; and [3] the partnership failed to address the conspicuous problem of stereotyping in partnership evaluations. [4] While these three factors might have been innocent alone, they combined to produce discrimination in the case of this plaintiff.

618 F.Supp. at 1120. I examine these elements in the same order.

1. *Partner comments influenced by stereotypes.* The bulk of the comments instanced as stereotyped are by Hopkins's supporters. One said that opponents focused on Hopkins' profanity "because its [sic] a lady using foul language," another characterized her as "macho," and another said she had "matured from a tough-talking, somewhat masculine hard-nosed mgr. to an authoritative, formidable, but much more appealing lady partner candidate." *Id.* at 1117. The majority evidently refers to these as "stereotypes . . . brought to bear on [Hopkins's] own candidacy," Maj. at 469, but there is no reason to suppose they harmed it.[3] The psychological speculations of Hopkins's boosters cannot by any stretch be "direct evidence that her gender was a significant motivating factor in her failure to make partner." *Id.* at 470.

As for the "smoking gun" remark by her most ardent supporter, Thomas Beyer ("walk more femininely," etc.), there is no reason to suppose that it represented any more than one partner's speculations. The district court was clearly erroneous in characterizing the statement as having been made by Beyer in fulfillment of his "responsib[ility] for telling her what problems the Policy Board had identified with her candidacy." 618 F.Supp. at 1117.

---

[3] *Cf.* Maj. at 466 ("The comments of Hopkins' supporters may or may not have harmed her candidacy . . . .")

Hopkins's own testimony showed that it was Joseph Connor (Beyer's superior) who bore the responsibility for informing Hopkins of the reasons for the decision and who did so. Tr. at 87-97. Hopkins testified that Connor made no remarks about her sex. *Id.* at 95. After speaking with Connor she sought Beyer's advice, along with that of several other partners. *Id.* at 98. Beyer had been on vacation, and he made no claim whatever to inside information on the discussions of the Policy Board: he and Hopkins "tried to *guess* who some of the [opposing partners] might be." *Id.* at 89 (emphasis added). Neither her account of that conversation nor any part of her testimony contradicts the natural inference that his advice was just that: personal speculation as to possibly winning strategies. *Id.* at 102. Beyer's testimony confirms this interpretation: Connor had said nothing to Beyer suggesting that Hopkins' dress, walk, or any aspect of her personal appearance was a problem, but Beyer believed such a change might help. *Id.* at 168. He never articulated the basis for the belief.

The majority tries to shore up the misconception by imputing to Price Waterhouse an "artificial assumption that Beyer . . . would be kept completely in the dark as to the Policy Board's views on her candidacy." Maj. at 466. No one assumes any such thing. The issue is whether Beyer was summarizing the Policy Board's views or was offering his own helpful suggestions. The evidence of Hopkins and Beyer is clear that it was the latter. The only faint evidence the other way came from Roger Marcellin, a partner in another office who did field work for the Policy Board. Tr. at 305-07. He simply assumed ("ha[d] no doubt") that Beyer would be reporting "where the problems were." *Id.* at 316. Beyer's and Hopkins's testimony on the subject makes clear that Marcellin's guesswork was inaccurate.

In the majority's most dramatic imaginative leap, the stereotyped language of Hopkins's supporters is said,

without a shred of supportive evidence, to have "len[t] credence to [stereotyped complaints of Hopkins's critics] and unwittingly undermin[ed] the support they sought to provide." Maj. at 466 n.3. The creativity of the proposition is underscored by its building in an assumption that stereotyped critiques by Hopkins's opponents exist--an assumption for which the majority identifies no record support.

The only remark by a Hopkins opponent that can be characterized as manifesting sexual stereotyping is the facetious suggestion that she should take a "course at charm school." The smoke from this gun seems to me rather wispy. It was embedded in the following comment:

> Contacts with Ann are only casual—several mtgs at OGS and MMGS sessions. However, she is consistently annoying and irritating—believes she knows more than anyone about anything, is not afraid to let the world know it. Suggest a course at charm school before she is considered for admission. I would be embarrassed to introduce her as a ptnr.

Def.Exh.27.

The substance of the remark has nothing to do with sex stereotypes. It fits with the many other characterizations of Hopkins ("too assertive, overly critical of others, impatient with her staff"; it required "diplomacy, patience and guts to work with her"; 618 F.Supp. at 1114) for which, the district court found, plaintiff's "conduct provided ample justification," *id.* The objection, of course, is to the opponent's silly phrase. The reference was doubtless sex-linked, and the majority is not unfair in characterizing it as a "somewhat derogatory colloquialism." Maj. at 466 n. 4. Thus it may be more "sexist" than a comment, such as might be made of a young man, wanting in character, that he ought to be "sent to military school." But to find discrimination by Price Waterhouse based simply on this remark is "utterly implausible." *See*

Bishopp v. District of Columbia, 788 F.2d 781, 786 (D.C. Cir.1986) (discussing criteria for disregarding district courts' findings of fact in Title VII cases).

The district court and the majority take refuge in comments made by Price Waterhouse partners in evaluations of other women in other years. 618 F.Supp. at 1117; Maj. at 467-468. These included one plainly beyond the pale—a remark by a partner that he "could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers." 618 F.Supp. at 1117. So we know that, at least at some time in the past, there was one male chauvinist pig rampant among the Price Waterhouse partners. But there is no evidence that this troglodyte ever influenced a single other partner. His comment was not repeated after 1981, perhaps because the informal atmosphere in the firm made such remarks unacceptable. In any event, no one claims he played any role in the relevant evaluation.

The other remarks (still relating to other evaluations in other years) are ambiguous. For instance, it had been said of one woman candidate that she acted too much like "one of the boys," 618 F.Supp. at 1117, but this was apparently a criticism of her for socializing too much with the clerical staff and not enough with the professionals. Def.Exh. 64, tab 22. Even the majority recognizes that these remarks had no "direct impact on plaintiff's candidacy." Maj. at 468. But it takes them as evidence that partners at Price Waterhouse "often evaluate female candidates in terms of their sex." *Id.*

In a case where alleged sexual stereotyping had a demonstrable connection to the plaintiff, a careful analysis of such remarks would be in order. Such an analysis would begin with the recognition that not all sex-based phrases are sexist. Our vocabulary is full of such phrases, some of which have gradually detached themselves from any genuine link to sex, or even switched sex.

Thus "doll," originally a slang phrase for a "conventionally pretty and shapely young woman, . . . whose function is to elevate the status of a male and to inspire general lust," *see* NEW DICTIONARY OF AMERICAN SLANG 108 (R. Chapman ed. 1986), has come in some contexts to refer to any "notably decent, pleasant, generous person," as in "Isn't he a doll?" That is the way language evolves, especially in a lively, spontaneous culture such as ours. Words themselves are metaphors, and it is in their nature to acquire meanings completely detached from original, concrete detail, whether or not sex related. Thus the phrase "BS" clearly relies on no distinction between cows and bulls.

Here, the phrase "one of the boys" was used in a sex-neutral sense: it was used of a woman, and since it evidently referred to her camaraderie with clerical staff at Price Waterhouse, the statistical probability is overwhelmingly that they were predominantly women. The phrase's connotation of easy familiarity (an "ordinary, amiable man . . . without side or lofty dignity; = ORDINARY JOE: *His Eminence was trying to be one of the boys*," *id.* at 305) easily escapes its masculine origins. The phrase does not manifest sexism, notwithstanding the solemn avowals of the plaintiff, the district court and the majority.

But this case does necessitate a study of just what expressions Congress may have wished to wash from the American tongue. The remark related to another candidate in another year. It plainly was not "direct evidence that [Hopkins's] gender was a significant motivating factor in her failure to make partner." Maj. at 470.

In discussing sex stereotyping, the district court gave great weight to the testimony of Dr. Susan Fiske, a witness purporting to be an expert in that field. She claimed

to be able to find forbidden stereotyping simply by reading partners' comments—without information about the truth of the matters commented upon. Of course where the remarks themselves carry such a tint (if, for example, a commenter had said, "She's too masculine"), anyone could do so. But (apart from the "charm school" remark) no Hopkins detractor said any such thing. Dr. Fiske's expertise rose to the occasion. Her arts enabled her to detect sex stereotyping based largely on "the intensity of the negative reaction." Tr. at 559. So if an observer characterized someone as "overbearing and arrogant and abrasive and running over people," an expert such as Dr. Fiske could discern—and would, if the subject were a woman—that they stemmed from unconscious stereotypes. Dr. Fiske could do this without meeting the subject of the comment or making any inquiry into a possible factual basis. *Id.* at 569, 595-97. To an expert of Dr. Fiske's qualifications, it seems plain that no woman could *be* overbearing, arrogant or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to a woman on such attributes.

2. *The evaluation process gave weight to such comments.* This generalization suffers precisely the defect of the first leg of the tripod of liability: it depends entirely upon comments that could have adversely affected Hopkins. Either they related to other candidacies in other years, or they represented her supporters' views or intuitions about her adversaries. All we have that connects in any potentially adverse way with Hopkins is the "charm school" remark.[4]

---

[4] If this leg is in any way based on the firm's procedure of giving substantial weight to "no" votes, it is inconsistent with the district court's prior finding that "the firm's practice of giving 'no' votes great weight treated male and female candidates in the same way." 618 F.Supp. at 1116. *See Mitchell v. Baldridge*, 759 F.2d 80, 85 n. 3 (D.C. Cir. 1985).

3. *Neglect of duty to address problem of stereotyping.* Key to the district court's finding of liability was Price Waterhouse's failure to institute special programs for sensitizing partners to sex stereotyping, or otherwise to stamp it out of the evaluation process. 618 F.Supp. at 1120. This breaks new ground, blithely free of any effort to link it to any established legal principles. Nor is the new theory intelligibly defined. What set of facts triggers the duty? If such an omission is to ground liability, perhaps the plaintiff should bear an initial burden of demonstrating that gender stereotyping was more probably than not the cause of the adverse employment decision. The majority, like the district court, fails to clarify this important issue, perhaps because it is so clear that Hopkins failed to make such a showing.

From the facts here, it looks as though the duty to sensitize has a hair trigger. The implications are serious. The more delicate the trigger, the more completely this court has dropped the requirement of intentional discrimination out of the law. As few employers can say with confidence that those who run its hiring and promotion are one hundred percent free of what may later be characterized as forbidden stereotyping, the only safe course will be to institute programs of the sort approved by the district court. The rule turns Title VII from a prohibition of discriminatory conduct into an engine for rooting out sexist thoughts.

4. *Innocent alone, the three factors combined to produce discrimination in the case of this plaintiff.* Such alchemy is mysterious. Having found that specific complaints caused the Policy Board's adverse decision and that there was ample justification for the complaints, the district court took up the allegations of stereotyping floating in the Price Waterhouse ether and the remarkable intuitions of Dr. Fiske. 618 F.Supp. at 1117-20. The court began on a cautious note—some negative com-

ments on Hopkins "*might be* attributed to sex stereotyping." *Id.* at 1118. It next determined that the commenters "*may have been* influenced by a sex bias." *Id.* It then progressed from "might" to "did," but never revealed how it reached the final *ipse dixit*.

The evidence here establishes at most the existence of sexist attitudes. Thus there can be no doubt that this court's decision in *Toney v. Block* controls. The showing of "generalized discrimination" can at the most establish a *prima facie* case, requiring defendant to meet its burden of showing non-pretextual grounds for its action. The district court properly found those established, restoring the burden to plaintiff.

The majority would eviscerate *Toney* by a clever name change: calling the case one of mixed motive, the majority looks to precedents in related areas where a party acting with one permissible motive and one unlawful one may prevail only by affirmatively proving that it would have acted as it did even if the forbidden motive were absent. I have no quarrel with this principle. *See National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393, 403, 103 S.Ct. 2469, 2475, 76 L.Ed.2d 667 (1983); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). But it has no relevance where, as here, discrimination has "*not* been specifically attributed to the employment decision of which the plaintiff complains." *Toney*, 705 F.2d at 1366. *Toney* does not permit a plaintiff to invoke the "mixed motive" concept whenever (1) he or she has shown only background evidence of some generalized discrimination and (2) defendant has proven that a non-pretextual reason "formed the basis" of the act. If this court is to deep-six *Toney*, it should do so *en banc*.

There is not enough evidence of intentional discrimination to support a verdict for Hopkins under any established approach to Title VII liability. The stereotype

theory adopted by the district court should not be allowed to spring to life in a case where its occurrence is not plausibly related to the decision on plaintiff. If a court is to develop such a theory, it should do so in a context where it and the parties properly focus on what elements of sexual differentiation Congress may have sought to stamp out. If failure to provide sensitivity training is to be a ground of Title VII liability, there should be some illumination of the circumstances triggering the duty. And if *Toney* is to be overturned, it should not be by a panel of this court. I dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 84-3040

ANN B. HOPKINS,

Plaintiff,

v.

PRICE WATERHOUSE,

Defendant.

Sept. 20, 1985

MEMORANDUM

GESELL, District Judge.

Plaintiff was proposed for partnership in Price Waterhouse, a nationwide professional partnership, but was held for further consideration at the next annual partnership selection. The following year the partners in the unit where she worked decided not to propose her a second time. Plaintiff then resigned and filed this suit alleging sex discrimination in violation of Title VII. 42 U.S.C. § 2000e-2. The Court is asked to order that she be made a partner and to award back pay and other monetary relief. A bench trial lasting four and one-half days followed extensive discovery. After receiving proposed findings of fact, further briefs, and hearing full argument, the Court reaches the following findings of fact and conclusions of law.

Background

Price Waterhouse is a partnership that specializes in providing auditing, tax and management consulting services primarily to private corporations and government agencies. At the time this action was filed, Price Waterhouse had 662 partners operating in 90 offices scattered across the nation. Its partners are certified public accountants and other specialists.

Despite its size and geographic dispersal, Price Waterhouse has consistently sought to maintain the traditional characteristics of a professional partnership both in its management and partnership selection practices. Partners manage the firm through a Senior Partner and Policy Board elected by all the partners. New partners are regularly selected from the ranks of the partnership's senior managers through an elaborate recommendation and review process that culminates in a partnership-wide vote in which the successful candidates are approved. There is no limitation on the number of partners who may be selected in any one year.

The admissions process takes place annually and begins when the partners of each local office may propose that one or more senior managers from their office be considered as partnership candidates. Partners in the local offices draft written recommendations based on a detailed consideration of the candidates' qualifications. These proposals are distributed to all of the firm's 662 partners and each partner is invited to submit evaluation forms on any candidate about whom the partner may have information. Partners who have significant and recent contact with the candidate submit "long-form" evaluations and partners who only have a limited basis upon which to evaluate the candidate submit "short form" evaluations. These forms ask the partners to rank the candidates relative to other recent partnership candidates in 48 different categories ranging from practice development and technical expertise to interpersonal skills and partici-

pation in civic activities. The numerical rankings in this exhaustive list of relevant, neutral criteria is supplemented by asking the partners to indicate whether they believe the candidate should be admitted to the partnership, denied partnership or held for further consideration and asking them to provide a short comment explaining their assessment.

The Admissions Committee reviews each candidate's personnel file and members of the Committee make visits to some local offices to interview partners who have commented in order to determine more precisely the basis for their views on the candidates. The Admissions Committee then prepares a summary of the evaluations and other information and makes its recommendations to the Policy Board. If the recommendation is to "hold" a candidate for reconsideration in a later year or a "no" recommendation denying admission, the Committee prepares a short written statement summarizing its reasons.

The Policy Board reviews the recommendations of the Admissions Committee and votes to include a candidate on the partnership ballot, to "hold" the candidate, or to deny partnership. While the Admissions Committee's recommendations focuses primarily on the qualifications of the individual candidate, the Policy Board may occasionally interject business considerations and decide to recommend a candidate because of the firm's need for a particular type of partner or a particular skill. The candidates recommended by the Policy Board are submitted to the entire partnership for election, and candidates who are not included on the ballot are informed of the Board's reasons for rejecting their candidacy. Candidates who have been held may be reproposed in later years and the review process begins again. Price Waterhouse made every document generated by this admissions process on candidates proposed for admission in 1982, 1983 and 1984 available to the plaintiff during the course of discovery in this case.

In 1982 the plaintiff was proposed for partnership by her office, the Office of Government Services (OGS), which specializes in designing and implementing consulting and management projects for government agencies. Plaintiff was the only woman among the 88 candidates for partnership that year. All of the partners in OGS at that time were men. Indeed, as of July, 1984 only seven of the 662 partners at Price Waterhouse were women.

Plaintiff had had a successful career as a senior manager in OGS and had played a significant role in developing business for the firm. She played a key role in Price Waterhouse's successful effort to win a multi-million dollar contract with the Department of State. Afterwards, she helped prepare a proposal and manage a project for a computerized system to handle the State Department's real property worldwide and successfully managed the preparation of a competitive proposal for a computer system to track loans of the Farmers' Home Administration. She had no difficulty dealing with clients and her clients appear to have been very pleased with her work. None of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership. The partners in the OGS office fully endorsed her proposal for partnership. She was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked.

The comments submitted to the Admissions Committee, however, indicated that plaintiff had problems with her "interpersonal skills;" specifically, she had trouble in dealing with staff members. Eight of the thirty-two partners who submitted evaluations recommended that she be denied admission, three favored holding her for reconsideration, and eight indicated that they had insufficient basis for an opinion. Supporters and opponents of her candidacy indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with

staff.[1] She sometimes used profanity and appeared to be insensitive to others. These negative comments and the significant number of "no" votes, most of which were by partners filing short forms because of their limited contact with the plaintiff, were determinative in the Admission Committee's decision to recommend "that she should be HELD at least a year to afford time to demonstrate that she has the personal and leadership qualities required of a partner."[2] After a full discussion the Policy Board adopted this recommendation.

After learning that her candidacy had been put on hold plaintiff, at the urging of the Senior Partner, underwent a Quality Control Review in order to improve her chances of making partner the next year. Several partners indicated that they planned to give the plaintiff opportunities to demonstrate her abilities and receive more exposure. However, these partners never followed through on their plans and the favorable results of the Quality Control Review came too late because just four months after the Policy Board's recommendations the partners in OGS decided not to repropose the plaintiff for partnership. By that time, two partners in the OGS office strongly opposed her candidacy. Without strong support within that office, it was felt that her candidacy could not possibly be successful.

After the decision not to repropose, the plaintiff was advised that it was very unlikely that she would be admitted to partnership. Rather than waiting to try again or accepting an offer to remain as a senior manager, she resigned from Price Waterhouse in January, 1984. After pursuing the appropriate administrative remedies she brought this action.

Discussion

From the outset Price Waterhouse has conceded that plaintiff was qualified to be considered for partnership

[1] Plf. Ex. 21.

[2] Plf. Ex. No. 19; Tr. 267-68.

and probably would have been admitted but for the complaints about her interpersonal skills. Consequently, there is no dispute that the plaintiff has presented a *prima facie* case under Title VII by showing that she was a qualified partnership candidate, she was rejected, and Price Waterhouse continues to seek partners with her qualifications. *See Cooper v. Federal Reserve Bank*, 467 U.S. 867, 104 S.Ct. 2794, 2799, 81 L.Ed.2d 718 (1984); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 & n. 6, 101 S.Ct. 1089, 1094 & n. 6, 67 L.Ed. 2d 207 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). The only dispute between the parties is whether Price Waterhouse's concerns about the plaintiff's interpersonal skills present a legitimate, nondiscriminatory reason to deny partnership or constitute a pretext to disguise sex discrimination.

Plaintiff advanced three arguments for maintaining that the decision was discriminatory: (1) the criticisms of plaintiff's interpersonal skills were fabricated; (2) even if the firm believed her interpersonal skills were deficient, Price Waterhouse has routinely admitted male candidates with interpersonal skills problems if they had strong qualifications in other areas and would have admitted her if she had not been a woman; (3) the criticisms of the plaintiff's interpersonal skills for a product of sexual stereotyping by male partners and the firm's partnership selection process improperly gave full weight to these discriminatory evaluations. Price Waterhouse denies these allegations and claims that plaintiff was properly denied partnership because the firm, for legitimate business reasons, seeks to avoid having abrasive partners who might jeopardize morale and be incapable of successfully supervising staff as they move among different locations in response to work demands. Although plaintiff's arguments are closely interrelated, it is necessary to examine them separately.

1. Fabrication of Complaints About Interpersonal Skills.

The interpersonal skills of prospective partners was properly an important part of Price Waterhouse's written partnership evaluation criteria. Inability to get along with staff or peers is a legitimate, nondiscriminatory reason for refusing to admit a candidate to partnership. *Cf. Bellissimo v. Westinghouse Electric Corp.*, 764 F.2d 175, 37 Fair Empl.Prac.Cas. (BNA) 1862 (3d Cir.1985); *Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 73 (1st Cir.1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 433, 83 L.Ed.2d 359 (1984); *Burrus v. United Telephone of Kansas*, 683 F.2d 339, 342-43 (10th Cir.1982), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982).

It is clear that the complaints about the plaintiff's interpersonal skills were not fabricated as a pretext for discrimination. Even the plaintiff admitted that she is a "hard-driving" manager who pushes her staff and occasionally uses profanity.[3] Contemporaneous records of counseling sessions and evaluations conducted well before the plaintiff was proposed for partnership indicate that partners found her too assertive, overly critical of others, impatient with her staff, and counselled her to soften her image.[4] At the time, plaintiff indicated that she agreed with many of these criticisms. Even partners who strongly supported her partnership candidacy acknowledged these deficiencies, although in more muted tones, when emphasizing the high quality of her work and her value to the firm. Staff members who testified on the plaintiff's behalf indicated that she was an effective manager but her hard-driving style might be regarded as "controversial" and it required "diplomacy, patience and guts" to work with her.[5] Plaintiff's conduct provided

[3] Tr. 44, 52.

[4] Def.Ex. No. 10, 11, 12, 13, 14, 17, 24, 25.

[5] Tr. 423, 434.

ample justification for the complaints that formed the basis of the Policy Board's decision.

Plaintiff also alleges that the two OGS partners who blocked reproposing her after the Policy Board held her candidacy for reconsideration falsified their reasons to hide their discriminatory motives. There is not sufficient proof to support this allegation. One partner recommended that she be put on hold when she was first proposed and apparently opposed reproposal because he found her disagreeable to work with and had reservations about her technical skills and dedication to the firm. Although there is some suggestion that this partner may have held a personal grudge against the plaintiff, there is no proof that his position was animated by animosity toward her sex.

The second partner supported the plaintiff when she was first proposed, but changed his position after receiving additional criticism of her management style from staff members, having several conversations with the plaintiff, and reflecting on his previous experience with her work. His decision to oppose the plaintiff's candidacy put him in the uncomfortable position of being in direct conflict with the head partner in the office, who was one of the plaintiff's biggest boosters. Although the plaintiff disputes his version of the events that led him to change his vote, the Court found him to be a credible witness and accepts his account of these events. Plaintiff has failed to satisfy her burden of proving that the explanations given by these two partners were pretextual.

As a result, plaintiff has failed to show that the decision of the OGS partners not to repropose her was discriminatory. While offers from several partners to arrange assignments which might have improved her chances for partnership never materialized and no one made any effort to check on the plaintiff's current relationship with staff members after she was placed on hold, the evidence before the Court indicates that this was due to the timing

of the partnership evaluation process rather than any discriminatory motives. Only a few months separated the announcement that plaintiff had been placed on hold and the vote not to repropose her so the firm had little opportunity to change plaintiff's assignment or do a thorough investigation into her subsequent relationships with staff. The decision not to repropose was due to the unexpected position taken by the two partners discussed above and plaintiff has not proven that their actions were discriminatory.

2. *Balancing Interpersonal Skills Against Other Qualifications.*

Plaintiff alleges that even if there were problems with her interpersonal skills she was so highly qualified in every other respect that the firm would have made her a partner if it had not discriminated against her because of her sex. She claims that the Policy Board invariably admits men who have interpersonal skills problems and comparing her "superb" record with that of these men show that she is a victim of classic disparate treatment. Price Waterhouse does not concede that interpersonal skills were the plaintiff's sole deficiency, but it admits that they were the principle and determinative reason for the firm's decision. Nonetheless, Price Waterhouse claims that the male candidates that the plaintiff points to are not comparable and do not indicate disparate treatment.

Fortunately the Court does not have to engage in the difficult task of second-guessing the Policy Board's balancing of professional skills of candidates from different years in order to resolve this allegation. The contemporaneous records generated by the partnership selection procedure demonstrate that Price Waterhouse had legitimate, nondiscriminatory reasons for distinguishing between the plaintiff and the male partners with whom she compares herself.

From past partnership admissions records the plaintiff has identified two male candidates who were criticized for

their interpersonal skills because they were perceived as being aggressive, overbearing, abrasive or crude, but were recommended by the Policy Board and elected partner. Price Waterhouse points out that in both cases the Policy Board expressed substantial reservations about the candidates' interpersonal skills but ultimately made a "business decision" to admit the candidates because they had skills which the firm had a specific, special need and the firm feared that their talents might be lost if they were put on hold. In one case the Policy Board rejected a "hold" recommendation by the Admissions Committee because of business considerations. In addition, these candidates received fewer evaluations from partners recommending that they be denied partnership and the negative comments on these candidates were less intense than those directed at the plaintiff.[6]

The significance of "no" votes and negative comments warrants some further comment. In the course of this trial, Price Waterhouse has been very forthcoming in providing information on its partnership section process. The evidence as a whole indicates that over the years the firm has consistently placed a high premium on candidates' ability to deal with subordinates and peers on an interpersonal basis and to promote cordial relations within a firm which is necessarily dependent on team effort. Not only are candidates regularly held because of concerns about their interpersonal skills—the Policy Board takes any evaluations recommending denial of partnership or a negative reaction on this basis very seriously. Despite

---

[6] Def.Ex. Nos. 73, 83, 84; Plf.Ex. No. 20. In post-trial briefing, the plaintiff sought to raise two additional examples. The evidence before the Court on these candidates is fragmentary, at best, consisting of comments taken out of context, statistical summaries of their evaluation forms and brief notes. From this limited evidence it appears that these candidates also evoked fewer and less intense negative comments than the plaintiff. The Court finds that the plaintiff has not provided sufficient proof to demonstrate disparate treatment based on these candidates.

the fact that the negative comments of short form evaluations are often in sharp contrast to the glowing reports of partners who have had extensive contact with the candidate, such comments are treated as serious reservations and given great weight. "No" votes, even from short form commentors who may only have had very limited contact with the candidate, often result in a "no" or "hold" decision.

Thus, while plaintiff argues that her accomplishments in generating business, management and client satisfaction were so far above average that she would have been admitted despite any interpersonal skills problems if Price Waterhouse had honestly balanced all her qualifications, Price Waterhouse responds by pointing out that she received very few "yes" votes and more "no" votes than all but two of the 88 candidates that year. These no votes and negative comments, largely from partners outside OGS, effectively placed the plaintiff toward the bottom of the candidate pool. Regardless of its wisdom, the firm's practice of giving "no" votes great weight treated male and female candidates in the same way. "The issue in a case of alleged failure to hire or promote is not the objective superiority or inferiority of the plaintiff's qualifications, but rather whether the defendant's selection criteria—be they wise or foolish—are *nondiscriminatory*." *Mitchell v. Baldrige*, 759 F.2d 80, 85 n. 3 (D.C.Cir. 1985). The Court finds that the firm's emphasis on negative comments did not, by itself, result in any discriminatory disparate treatment.

Plaintiff tried to reinforce her claim of disparate treatment with a number of statistics that proved wholly inconclusive. Plaintiff attempted to show that the small number of women partners at Price Waterhouse indicates discrimination but her proof lacked sufficient data on the number of qualified women available for partnership and failed to take into account that the present pool of partners have been selected over a long span of years

during which the pool of available qualified women has changed. Women have only recently entered the accounting and related fields in large numbers and there is evidence that many potential women partners were hired away from Price Waterhouse by clients and rival accounting firms.

Although women partnership candidates have been elected to partnership at a slightly lower rate than men (60% versus 68%), the difference is not statistically significant. The other statistical studies presented by plaintiff only bear an indirect relationship to Price Waterhouse's practice in partnership selection, and when corrected to examine the appropriate comparisons, lack statistical significance. No conclusion can be drawn from this fragile data.

3. Stereotyping and the Partnership Selection Process.

Plaintiff's final argument begins with the allegation that the male partners who criticized her interpersonal skills applied a double standard. She claims that she was not evaluated as a manager, but as a woman manager, based on a sexual stereotype that prompts males to regard assertive behavior in women as being more offensive and intolerable than comparable behavior in men because some men do not regard it as appropriate "feminine" behavior.

Plaintiff claims that this type of sexual stereotyping is reflected in comments about her aggressiveness and profanity that indicate she was being evaluated as a woman and not simply as a partnership candidate. One commentator said "she may have overcompensated for being a woman." Another suggested that she needed to take a "course at charm school." Supporters indicated that her critics judged her harshly due to her sex. One acknowledged "Ann has a clearly different personality," but "[m]any male partners are worse than Ann (language and tough personality)," and people were only focusing on her profanity "because its a lady using foul language."

Another conceded that she initially came across as "macho" but said, "if you get around the personality thing she's at the top of the list or way above average." Another defended her by saying, "she had matured from a tough-talking, somewhat masculine hard-nosed mgr. to an authoritative, formidable, but much more appealing lady partner candidate." [7] When plaintiff consulted with the head partner at OGS, who was her strongest supporter and responsible for telling her what problems the Policy Board had identified with her candidacy, she was advised to walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.[8]

Some comments on other women partnership candidates in prior years support the inference that the partnership evaluation process at Price Waterhouse was affected by sexual stereotyping. Candidates were viewed favorably if partners believed they maintained their feminity while becoming effective professional managers. To be identified as a "women's liber" was regarded as negative comment. Nothing was done to discourage sexually biased evaluations. One partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers—yet the firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluations. Besides the plaintiff, the Admissions Committee rejected at least two other women candidates because partners believed that they were curt, brusque and abrasive, acted like "Ma Barker" or tried to be " 'one of the boys'." Comments suggesting that sex stereotypes may have influenced the partners' evaluations of interpersonal skills were not

---

[7] Plf.Ex. No. 21; Def.Ex. No. 30, 31; Tr. 321.

[8] Tr. 102, 316.

frequent, but they appear as part of the regular fodder of the partnership evaluations.[9]

Plaintiff presented a well qualified expert, Dr. Susan Fiske, who has done extensive research and study in the field of stereotyping. Dr. Fiske examined the partners comments about the plaintiff and other partnership candidates and gave opinions as to the possible presence of sex stereotyping. Dr. Fiske did not purport to be able to determine whether or not any particular reaction was determined by the operation of sex stereotypes. However, she did identify comments that she believed were influenced by sex stereotypes. Dr. Fiske stated that in her opinion unfavorable comments by male partners, slanted in a negative direction by operation of male stereotyping, were a major factor in the firm's evaluation of the plaintiff. But she could not pinpoint the degree to which stereotyping had influenced the selection process.

That deep within males and females there exist sexually based reactions to the personal characteristics of one of the opposite sex surely comes as no surprise. It is well documented that men evaluating women in managerial occupations sometimes apply stereotypes which discriminate against women.[10] Indeed, the subtle and unconscious discrimination created by sex stereotyping appears to be a major impediment to Title VII's goal of

---

[9] Def.Ex. No. 63.

[10] *See, e.g.*, Ruble, Cohen and Ruble, *Sex Stereotypes: Occupational Barriers for Women*, 27 Amer.Behav.Sc. 339 (1984) (surveying literature); R.M. KANTER, MEN AND WOMEN OF THE CORPORATION 206-42 (1977) (reporting results of study); Rosen and Jerdee, *Perceived Sex Differences in Managerial Relevant Characteristics*, 4 Sex Roles 837 (1978) (same); Rosen and Jerdee, *Influence of Sex Role Stereotypes on Personnel Decisions*, 59 J.Appl.Psych. 9 (1974) (same); Schein, *The Relationship Between Sex Role Stereotypes and Requisite Management Characteristics*, 57 J.App.Psych. 95 (1973) (same).

ensuring equal employment opportunities.[11] Dr. Fiske testified that situations, like that at Price Waterhouse, in which men evaluate women based on limited contact with the individual in a traditionally male profession and a male working environment foster stereotyping. One common form of stereotyping is that women engaged in assertive behavior are judged more critically because aggressive conduct is viewed as a masuculine characteristic.[12]

Establishing a claim of disparate treatment based on subjective evaluations requires proof of discriminatory motive or purpose. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977). The Court finds that while stereotyping played an undefined role in blocking plaintiff's admission to the partnership in this instance, it was unconscious on the part of the partners who submitted comments. The comments of the individual partners and the expert evidence of Dr. Fiske do not prove an intentional discriminatory motive or purpose. A far more subtle process is involved when one who is in a distinct minority may be viewed differently by the majority because the individual deviates from an artificial standardized profile. Even in examining the comments months later at trial, it is impossible to label any particular negative reaction as being motivated by intentional sex stereotyping. Business women who earn a place at the highest ranks of their profession by combining ability with a strong persistent effort to succeed frequently sense antagonism from some male colleagues

[11] *See* Taub, *Keeping Women in Their Place: Stereotyping Per Se As A Form of Employment Discrimination*, 21 B.C.L.Rev. 345, 349-61 (1980).

[12] *See, e.g.*, Wiley and Eskilson, *Coping in the Corporation, Sex Role Constraints*, 12 J.App.Soc.Psych. 1, 8 (1982); Prather, *Why Can't Women Be More Like Men: A Summary of the Sociopsychological Factors Hindering Women's Advancement in the Professions*, 15 Am.Beh.Sc. 172 (1971).

whose contact with the working female as an equal has been limited. However, considering the infinite variety of work conditions; differences in experience, education and perceptions among individuals in working encounters; as well as the fact that the interactions of personalities of either sex are as complex and inscrutable and as infinite as combinations of genes will produce, it is impossible to accept the view that Congress intended to have courts police every instance where subjective judgment may be tainted by unarticulated, unconscious assumptions related to sex.

But plaintiff takes her argument one step further and stresses that the Price Waterhouse partnership evaluation system permitted negative comments tainted by stereotyping to defeat her candidacy, despite clear indications that the evaluations were tainted by discriminatory stereotyping. All the evaluators were men. The Policy Board gave great weight to the negative views of individuals who had very little contact with the plaintiff. Several of the negative comments allude to the plaintiff's sex and many might be attributed to sex stereotyping. Despite the fact that the comments on women candidates often suggested that the male evaluators may have been influenced by a sex bias, the Policy Board never addressed the problem. The firm never took any steps in its partnership policy statement or in the evaluation forms submitted to partners to articulate a policy against discrimination or to discourage sexual bias.[13] The Admissions Committee never attempted to investigate whether any of

[13] Price Waterhouse submitted evidence to show it had promulgated a general policy of equal employment opportunities in employment for all minorities . Def.Ex. Nos. 88, 89. However, the exhibits before the Court only reflect a policy statement issued sometime in 1983. More importantly, the statement is directed generally at staff employment. It is not clear whether it applies to the partnership selection process at all and it does not address any special concerns with discrimination against women in an overwhelmingly male partnership.

the negative comments concerning the plaintiff were based on a discriminatory doubt standard.[14]

Whenever a promotion system relies on highly subjective evaluations of candidates by individuals or panels dominated by members of a different sex, there is ground for concern that such "high level subjectivity subjects the ultimate promotion decision to the intolerable occurrence of conscious or unconscious prejudice." *Robinson v. Union Carbide Corp.*, 538 F.2d 652, 662 (5th Cir.1976), *cert. denied*, 434 U.S. 822, 98 S.Ct. 65, 54 L.Ed.2d 78 (1977). Such procedures "must be closely scrutinized because of their capacity for masking unlawful bias." *Davis v. Califano*, 613 F.2d 957, 965 (D.C.Cir.1979). This scrutiny comprehends examination of evaluation procedures that permit or give effect to sexual stereotyping. Differential treatment on account of sex, even if it is not obviously based on a characteristic of sex, violates Title VII. *McKinney v. Dole*, 765 F.2d 1129, 1138-39 (D.C.Cir.1985). An employer who treats a woman with an assertive personality in a different manner than if she had been a man is guilty of sex discrimination. *See Craik v. Minnesota State University Board*, 731 F.2d 465, 481-84 (8th Cir. 1984); *Skelton v. Balzano*, 424 F.Supp. 1231, 1235 (D.D.C.1976). A female cannot be excluded from a partnership dominated by males if a sexual bias plays a part in the decision and the employer is aware that such bias played a part in the exclusion decision.

Although the stereotyping by individual partners may have been unconscious on their part, the maintenance of a system that gave weight to such biased criticisms was a conscious act of the partnership as a whole. There is no direct evidence of any determined purpose to maliciously discriminate against women but plaintiff appears to have been a victim of "omissive and subtle" discrimination created by a system that made evaluations based

[14] Def.Ex. No. 23; Tr. 280-81; Connor Dep. at 103.

on "outmoded attitudes" determinative. *Marimont v. Califano*, 464 F.Supp. 1220, 1226 & n. 15 (D.D.C. 1979). As noted above, the firm accorded substantial weight to negative comments and recommendations, even if they came from partners who had limited contact with a candidate. The evidence indicates that Price Waterhouse should have been aware that women being evaluated by male partners might well be victims of discriminatory stereotypes. Yet the firm made no efforts to make partners sensitive to the dangers, to discourage comments tainted by sexism, or to investigate comments to determine whether they were influenced by stereotypes.

The Court is aware that this case involves applying Title VII to a professional partnership. Partnership consideration was clearly a privilege of plaintiff's employment covered by Title VII. *Hishon v. King and Spaulding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). Title VII does not bar a partnership from considering subjective evaluations of interpersonal skills as significant criteria in the partnership selection process. Subjective evaluations in high-level, professional jobs have received particular deference in Title VII cases. *See Zahorik v. Cornell University*, 729 F.2d 85, 93 (2d Cir.1984); *Harris v. Group Health Insurance*, 662 F.2d 869, 873 (D.C. Cir.1981); Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv.L.Rev. 945, 973-78 (1982); Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 Wm. & Mary L.Rev. 45, 48-62 (1979). However, while partnerships must be given freedom to evaluate the qualifications of employees who seek to become partners, they are not free to inject stereotyped assumptions about women into the selection process. Neither a partnership nor any other employer can remain indifferent to indications that its evaluation system is subject to sex bias, as Price Waterhouse did in plaintiff's case. Price Waterhouse's failure to take the steps necessary to alert partners to the pos-

sibility that their judgments may be biased, to discourage stereotyping, and to investigate and discard, where appropriate, comments that suggest a double standard constitutes a violation of Title VII in this instance.[15]

Price Waterhouse had every reason and legal right to come down hard on abrasive conduct in men or women seeking partnership. But "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes.'" *County of Washington v. Gunther*, 452 U.S. 161, 180, 101 S.Ct. 2242, 2253, 68 L.Ed.2d 751 (1981), *quoting Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 707 n. 13, 98 S.Ct. 1370, 1375 n. 13, 55 L.Ed.2d 657 (1978). This is not a case where "standards were shaped only by neutral professional and technical considerations and not by any stereotypical notions of female roles and images." *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 38 Fair Empl.Prac.Cas. (BNA) 404, 412 (8th Cir.1985). Discriminatory stereotyping of females was permitted to play a part. Comments influenced by sex stereotypes were made by partners; the firm's evaluation process gave substantial weight to these comments; and the partnership failed to address the conspicuous problem of stereotyping in partnership evaluations. While these three factors might have been innocent alone, they combined to produce discrimination in the case of this plaintiff. The Court finds that the Policy Board's decision not to admit the plaintiff to partnership was tainted by discriminatory evaluations that were the direct

[15] Common sense is confirmed by the literature on the problem of sex stereotyping which suggests that making evaluators aware of the risk of biased evaluations and inquiring as to whether generalizations are supported by concrete incidents can be effective in eliminating or minimizing stereotyping. *See* Taub, *supra* note 7, at 3600, 395-97; Wiley and Eskilson, *supra* note 8, at 9.

result of its failure to address the evident problem of sexual stereotyping in partners' evaluations.[16]

Remedy

Because plaintiff had considerable problems dealing with staff and peers, the Court cannot say that she would have been elected to partnership if the Policy Board's decision had not been tainted by sexually biased evaluations. Even supporters of the plaintiff viewed her style as somewhat offensive and detrimental to her effectiveness as a manager. However, once a plaintiff proves that sex discrimination played a role in an employment decision, the plaintiff is entitled to relief unless the employer has demonstrated by clear and convincing evidence that the decision would have been the same absent discrimination. *Williams v. Boorstin*, 663 F.2d 109, 117 (D.C.Cir.1980); *Day v. Mathews*, 530 F.2d 1083, 1085-86 (D.C.Cir.1976). Price Waterhouse has not done so. Where sex discrimination is present, even if a promotion decision is a mixture of legitimate and discriminatory considerations, uncertainties must be resolved against the employer so that the

[16] There is currently a split among the circuits as to whether a subjective evaluation process may be challenged based on disparate impact and disparate treatment theories or may only be challenged on disparate treatment theory. *Compare Pouncy v. Prudential Insurance Company of America*, 668 F.2d 795, 799-801 (5th Cir. 1982) (discriminatory impact model inappropriate for challenging subjective evaluation procedures) *with Griffin v. Carlin*, 755 F.2d 1516, 1522-25 (11th Cir. 1985) (both models may be used to challenge subjective evaluations); *Segar v. Smith*, 738 F.2d 1249, 1288 n. 34 (D.C. Cir. 1984) (disparate impact applied to evaluation process with some subjective elements). We need not become involved in this dispute. Plaintiff cannot show the substantial statistical disparity ordinarily required to show that a subjective evaluation process produces a discriminatory disparate impact. *See Yartzoff v. State of Oregon*, 745 F.2d 557 (9th Cir. 1984). This decision is based on disparate treatment where the employer maintained a subjective evaluation process which, based on the proof presented in the comments on the plaintiff, resulted in plaintiff's evaluation being tainted by a discriminatory bias.

remedial purposes of Title VII will not be thwarted by saddling an individual subject to discrimination with an impossible burden of proof.

However, plaintiff must carry the burden of proof on another issue. She has the burden of proving that she was constructively discharged. If the plaintiff resigned voluntarily, and not because Price Waterhouse made working conditions intolerable and drove her to quit, she is not entitled to an order that she made a partner. *Clark v. Marsh*, 665 F.2d 1168, 1172-73 (D.C.Cir.1981). The fact that discrimination has occurred does not, by itself, provide the "aggravating factors" required to prove a constructive discharge. *Id.* at 173-74. Plaintiff has not shown any history of discrimination, humiliation or other aggravating factors that would have compelled her to resign. She dropped her allegations of harassment and retaliation before trial. Aside from Price Waterhouse's denial of partnership, plaintiff's experience at the firm appears to have been quite normal and amicable. The one incident in which a project managed by the plaintiff was unfavorably evaluated appears to have involved a disagreement over the appropriate technical standards rather than an improper effort to pressure plaintiff to resign. Price Waterhouse offered to retain her as an employee and some partners even encouraged her to take this option rather than resign when it appeared unlikely that she would become a partner.[17] Being denied partnership was undoubtedly a professional disappointment and it may have been professionally advantageous for plaintiff to leave the firm when it was unlikely she would not obtain her ultimate goal. Disappointments do not constitute a constructive discharge, however. *See Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 65-66 (5th Cir.1980); *Sparrow v. Piedmont Health Systems Agency, Inc.*, 593 F.Supp. 1107, 1117-18 (M.D.N.C.1984). Recognizing that in partnerships, as in other employment contexts, "society and the policies underlying Title VII will

[17] Tr. 112.

be best served if, wherever possible, unlawful discrimination is attacked within the context of exiting employment relationships." 617 F.2d at 66, plaintiff's failure to show a constructive discharge requires the Court to deny plaintiff's request for an order directing Price Waterhouse to make her a partner.

Because plaintiff has failed to prove a constructive discharge, she is not entitled to any monetary relief for the period subsequent to her resignation. *Clark v. Marsh*, 665 F.2d at 1172. Nevertheless, plaintiff has satisfied her burden of proving discrimination under Title VII and established the predicate for an award of backpay from the date she would have been elected partner, July 1, 1983, until her voluntary resignation on January 17, 1984. Backpay for these few months, limited to the difference between plaintiff's compensation as a senior manager during that period and what her compensation would have been if elected to partnership, might have been appropriate if proof had been presented. However, no evidence has been presented on what compensation plaintiff would have received if she had been elected partner. The parties have represented that, without the knowledge or consent of the Court, they agreed to defer resolving the amount of backpay until the issue of liability was resolved. But the parties do not have the authority to structure a trial for their own convenience. Issues can only be separated for a separate trial by order of the Court. Fed.R.Civ.P. 42(b). No such order was ever requested or granted in this case. A party who makes an "unauthorized determination not to go forward on issues that were properly in the case does so at his own peril." *U.S. Industries Inc. v. Blake Construction Co., Inc.*, 765 F.2d 195, 209-10 (D.C.Cir.1985). Under the circumstances the Court can do no more than recognize plaintiff as the prevailing party on the issue of liability, grant judgment in favor of the plaintiff, and award attorneys fees. No other equitable relief is appropriate on this record.

An appropriate order is entered contemporaneous with the filing of this memorandum.

ORDER

It appearing for reasons set forth in a memorandum filed this day that plaintiff has prevailed on the merits of her claim that denial of partnership in her specific situation was caused, in part, by defendant's failure to protect against the presence of sex discrimination in evaluations of her qualifications for partnership, but that plaintiff has failed to establish any basis for granting equitable relief in the form of backpay or other relief, it is hereby

ORDERED, that the complaint shall be and hereby is dismissed; and it is further

ORDERED, that plaintiff shall be and hereby is awarded her reasonable attorneys fees plus costs to be set by the clerk; and it is further

ORDERED, that the parties shall attempt to agree on an amount to compensate for such reasonable attorney fees and advise the Court in writing on or before September 30, 1985, whether further proceedings to establish the fee award will be necessary.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6052

ANN B. HOPKINS,

v. *Appellant*

PRICE WATERHOUSE

No. 85-6097

ANN B. HOPKINS

v.

PRICE WATERHOUSE,

Appellant

[Filed Aug. 4, 1987]

Appeal from the United States District Court
for the District of Columbia

Before: EDWARDS and WILLIAMS, Circuit Judges, and JOYCE HENS GREEN,* District Judge.

---

* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is hereby affirmed in part and reversed in part, and these cases are remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: August 4, 1987

Opinion for the Court filed by District Judge Green.

Dissenting opinion filed by Circuit Judge Williams.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6052

ANN B. HOPKINS

v.

PRICE WATERHOUSE

[Filed Sept. 30, 1987]

Before: EDWARDS and WILLIAMS, Circuit Judges; JOYCE H. GREEN,* District Judge, U.S. District Court for the District of Columbia

ORDER

Upon consideration of the petition for rehearing of appellee/cross-appellant, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Williams would grant the petition for rehearing.

---

* Sitting pursuant to 28 U.S.C. 292(a).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6052

ANN B. HOPKINS

v.

PRICE WATERHOUSE

[Filed Sept. 30, 1987]

Before: WALD, Chief Judge; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D. H. GINSBURG, Circuit Judges

ORDER

The suggestion for rehearing *en banc* of appellee/cross-appellant has been circulated to the full Court. The taking of a vote thereon was requested. Thereafter, a majority of the judges of the Court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Chief Judge Wald and Circuit Judges Starr and D. H. Ginsburg did not participate in this order.